TRANSCRIPT

OF

RECORD

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 167

W. C. TUCKER, PETITIONER,

vs.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1927

CERTIORARI GRANTED MARCH 7, 1927

(32,417)

(32,417)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 850

W. C. TUCKER, PETITIONER,

vs.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, eighth circuit	*a*	1
Caption (omitted in printing)	*a*	
Record from the district court of the United States, western Oklahoma	1	1
Citation and service (omitted in printing)	1	
Writ of error	2	1
Return to writ of error (omitted in printing)	3	
Petition	3	2
Exhibit A—Notice and demand for tax	6	5
Exhibit B—Taxpayers' receipt for income and excess-profits tax	7	6
Exhibit C—Blank form for claims	9	6
Answer	11	6
Bill of exceptions	11	7
Caption	11	7

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	Original	Print
Appearance of counsel	11	7
Argument of counsel	11	7
Testimony of W. C. Tucker	15	12
A. N. Ruble	30	30
H. J. Smith	33	33
R. W. Tucker	34	35
G. W. Hutchins	38	39
W. E. McGuire	39	41
Exhibit No. 1—Income-tax return	47	47
No. 2—Notice and demand for tax	52	49
No. 3—Receipt	53	50
No. 4—Claim for refund	54	51
No. 5—Letter from J. G. Bright to W. C. Tucker, April 24, 1925	56	54
No. 6—Table of taxes	59	57
No. 7—Minutes of meeting of board of directors	62	61
Colloquy between counsel	65	64
Testimony of S. O. Dye	66	65
Offer in evidence	70	70
Defendant's Exhibit A in Evidence—Statement re consolidation of Osage Mercantile Co. and Osage Real Estate Co. re consolidation for purpose of tax return	70	71
Approval of bill of exceptions by counsel and prayer for approval	72	72
Order settling bill of exceptions	72	73
Plaintiff's motion for judgment	73	73
Defendant's motion to dismiss	73	74
Judgment	73	74
Petition for writ of error and order allowing same	78	79
Assignments of error	78	80
Bond on writ of error (omitted in printing)	80	
Praecipe for transcript of record	82	81
Clerk's certificate (omitted in printing)	84	
Appearances of counsel (" " ")	85	
Argument and submission (" " ")	86	
Opinion, Stone, J.	87	83
Judgment	92	87
Motion for stay of mandate	93	88
Petition for rehearing (omitted in printing)	96	
Order denying petition for rehearing and staying mandate	98	89
Clerk's certificate (omitted in printing)	99	
Order allowing certiorari	100	90

[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on James A. Ingraham, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT, WESTERN OKLAHOMA

Writ of Error

United States of America, ss:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the Special May Term, 1925, thereof, between W. C. Tucker, plaintiff, and Acel C. Alexander, Collector of Internal Revenue, defendant, a manifest error hath happened, to the great damage of the said W. C. Tucker as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the Office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 18th day of September, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 20th day of July, in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in Guthrie, Oklahoma, with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

Harry L. Finley, Clerk of the District Court of the United States, Western District of Oklahoma. (Seal United States Dist. Court, Western Dist. of Oklahoma.)

Allowed by John H. Cotteral, Judge.

[fol. 3] Return to writ of error omitted in printing.

In United States District Court

No. 2990

W. C. Tucker, Plaintiff,

vs.

Acel C. Alexander, Collector of Internal Revenue, Defendant

Petition—Filed October 7, 1924

Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander, Collector of Internal Revenue, the defendant above named, alleges and says:

(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Rev-

enue under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten [fol. 4] days after the date thereof a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true, and correct copy of which notice and demand is hereto attached, marked Exhibit A, and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 30, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit B, and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net

actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and [fol. 5] illegally assumed and took $356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his income tax return for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation at a deduction from income, but included said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggreated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

(4) That on the 2nd day of November, 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit C and made a part hereof; and that

more than six months have elapsed since the filing of said claim with said Commissioner and he has not rendered a decision thereon.

Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84 with interest thereon at the rate of 6 per cent per annum from the 30th day of October, 1923, and the costs of the action.

Chas. H. Garnett, Attorney for Plaintiff.

[fol. 6] "Exhibit A" to Petition

Income, War-profits, and Excess-profits Tax

Notice and Demand for Tax

Form 7658

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from Oct. 15, 1923, until paid.

Date: Oct. 4, 1923.

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at Oklahoma, Okla. not later than Oct. 15, 1923.

Date: —— —, ——. Collectors Paid Stamp.

To the Collector of Internal Revenue:

I enclose herewith the sum of $— in payment of the tax shown below.

—— ——,
—— ——.

Name and Address: Tucker, W. C., Pawhuska, Okla.
Sept. 97.

Items: Additional 1920 tax disclosed by audit in Washington.

Total Assessment: 8,610.84.

[fols. 7 & 8] "Exhibit B" to Petition

Treasury Department, United States Internal Revenue

Form 1107

Notice to Taxpayer

Before presenting payment to cashier enter on this form (a) Name, (b) Address, (c) Form number of return, (d) Amount of tax paid.

Taxpayer's Receipt for Income and Excess Profits Tax

Office Collector Internal Revenue

CK.
Paid under protest.
Form No. of return Com'r's 23a.
Sept. 97—Addl. 1920 Tax, $8,610.84.
Name: W. C. Tucker.
Address: Pawhuska, Oklahoma.
Received Payment 10-30-23.
Axel C. Alexander, Collector of Internal Revenue, by M. Haws, Cashier.

(Here follows "Exhibit C" to Petition, marked side folio pages 9 and 10)

[fol. 11] In United States District Court

Answer—Filed February 9, 1925

Comes now the defendant above named, and for answer to the petition of the plaintiff herein, denies each and every allegation therein contained.

Roy St. Lewis, Attorney for the Defendant.

EXHIBIT C TO PETITION

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Claim For

- Abatement of Tax Assessed
- Credit Against Outstanding Assessments
- Refund of Taxes Illegally Collected
- Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation

District

Account number

Date received

Stamp here

.....
Collector of Internal Revenue

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Oklahoma,
County of Osage. } ss:

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Type or Print

.....W. C. Tucker,.....
(Name of taxpayer or purchaser of stamps.)
.....Pawhuska, Oklahoma. .....
(Residence—give street and number as well as city or town and State.)

.....
(Business address.)

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

___ Credit Against Outstanding Assessments

___ Refund of Taxes Illegally Collected

___ Refund of Amounts Paid for Stamps Used in Error or Excess

Account number

Date received

Stamp here

Collector of Internal Revenue

State of Oklahoma, } ss:
County of Osage.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Type or Print

W. C. Tucker,
(Name of taxpayer or purchaser of stamps.)

Pawhuska, Oklahoma.
(Residence—give street and number as well as city or town and State.)

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From Jan. 1,	1920
	To Dec. 31,	1920

1. Business in which engaged General Merchandise
2. Character of assessment or tax Income Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased ... $13,783.76
4. Reduction of Tax Liability requested (Income and Profits Tax) ... $ 9,301.23
5. Amount to be abated ... $...None
6. Amount to be refunded (or such greater amount as is legally refundable) ... $ 9,301.23
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) $5172.92 Installments in 1921
(If statement covers income tax liability, items 8–11, inclusive, must be answered.) $8610.84 Paid 10-30-23
8. District in which return (if any) was filed Oklahoma.
9. District in which unpaid assessment appears No unpaid assessment ... $ None
10. Amount of overpayment claimed as credit ... $ None.
11. Unpaid assessment against which credit is asked; period from ... to ...

Deponent verily believes that this application should be allowed for the following reasons:

That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said Company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT: PA: FR-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 1st day of November, 1923

Signed: W. C. TUCKER

LOIS HAYNIE,
Notary Public.
(Seal) (Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

Endorsed: Filed in the District Court on October 7, 1924.

9-10

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed July 20, 1925

CAPTION

Now on this 13th day of June, A. D. 1925, the above entitled and numbered cause comes on to be heard before Honorable J. H. Cotteral, Judge of said court, a jury having been waived by the parties.

APPEARANCES OF COUNSEL

The plaintiff is represented by C. H. Garnett, Esq., of Oklahma City, Oklahoma.

The defendant is represented by Floyd E. Toomey, Esq., special attorney Bureau of Internal Revenue, and James A. Ingraham, Esq., Assistant United States Attorney.

Both sides announcing ready for trial, the following proceedings were had as follows, to-wit:

ARGUMENT OF COUNSEL

Opening Statements

Mr. Toomey: This is a case where the Osage Mercantile Company, a corporation at Pawhuska was organized in 1902. The plaintiff in this case is a stockholder, and he was, I think, from the beginning of that corporation to its liquidation in 1920, and the tax involved here is an individual tax of a stockholder in the Osage Mercantile corporation. The corporation continued in existence until 1920 at which time it dissolved and liquidated, and the assets of the corporation—I might say from 1914 on I believe the Osage Mercantile Company was owned by two stockholders, W. C. Tucker, the plaintiff in this case and his brother. In 1920 they dissolved the corporation, and W. C. Tucker and his brother continued business as a partnership, the Osage Mercantile Company, continued it at the same place, same

business and under the same name and same management. The tax question arises in this way: It is the determination of the taxable income received by W. C. Tucker one of the stockholders of this corporation by having received his partnership share of the liquidated assets of this corporation. The case really arises I think under Section 201 and sub-division (c) of the Revenue Act of 1918 which provides [fol. 12] that amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares and shall be taxed to the distributee the same as other gains or profits. Now that section of the law simply throws it over onto the general proposition, that is, where a taxpayer had assets prior to March first, 1913 the effective date of the 16th amendment, which he sells or converts subsequent to March first, 1913, the taxable gain, is the difference between the value of the property on those two dates, so in this case the disputed question involved is, what is the next taxable income of W. C. Tucker arising out of his receiving his proportionate share of the liquidated assets of the Osage Mercantile Company in 1920, and to arrive at that we have to arrive at it as of March first, 1913, the value of those assets and subtracting that from the value of those assets at the date of liquidation in 1920. Now that is very simple, but the legal question in this case, the big legal question is the proper means of arriving at that March first, 1913 value, and the evidence will be something like this, in order to get the controversy clearly before the court. On March 1st, 1913, the assets of this Osage Mercantile Company or corporation were divided really into two corporations, or parts. There was a mercantile business proper and real estate. I think the evidence will show that the value of these two parts of the business were about equal. On May 8th, 1913, three months later, they take out of the business and take away from this Osage Mercantile corporation all of its real estate and transfer it to a newly formed corporation. I think it was done in order to comply with the Oklahoma laws prohibiting a mercantile company from holding real-estate. Now in arriving at the March 1st value of the assets of this corporation we have deducted the value of this real estate feature of the business which was taken away from the corporation, and that is practically the only legal question in

this case, is whether or not in arriving at the March first value of this corporation's assets, the Government proceeded properly in deducting from that value of the real estate which was taken away from the corporation three months later. This real estate was transferred over and they called it the Mercantile Real estate corporation. This continued in existence and is in existence today owned by the same stockholders in the same proportion to their holdings in the Osage Mercantile Company. The Mercantile Company liquidated in 1920, but the real estate company continued in existence so what they did was to liquidate just the mercantile feature of the business and they are seeking [fol. 13] in determining the taxable gain to be derived from that liquidation to take away from it the real estate from the Mercantile Company's value as of March 1st, 1913 which we contend would be allowing them a double deduction. It would be allowing them to take out in 1920 something of the business which they still have. That roughly speaking is our position. Perhaps I haven't made myself clear, but I think it will unfold from the evidence and will perhaps be clear to the court as we go along.

Opening Statement for Plaintiff

Mr. Garnett: The statements of Mr. Toomey, I think, are in the main correctly made, but there are a few matters he is in error on. In the first place, in 1913, the stockholders were some seven or eight in number, Mr. Ferguson, Mr. Hutchins, Mr. Mosier, Mr. Mathews and the Messrs. Tuckers, two of them. Mr. Mosier's stock was disposed of in 1914. The other stockholders held their shares until 1920. It never passed into the entire ownership of Messrs. Tucker until in 1920. The real estate in 1913 was just a little more than one third of the value of the assets of the corporation as shown on their books. It was perhaps two-fifths of it as shown on their books. Now about May in 1913 this real estate was distributed in the form of a dividend, the facts being that it was transferred to another corporation known as the Mercantile Real Estate Company and charged off the books of the Osage Mercantile Company as a dividend to stockholders. The stock in the

Mercantile Real Estate Company was issued to the stockholders of the Osage Mercantile Company in the same proportion as their stock holdings in the latter company. I think the Mercantile Real Estate Company is still in existence perhaps with some changes in stock ownership; at least one of the stockholders died. Now it is the contention of the plaintiff that this distribution of real estate was a dividend at that time and declared out of accumulations prior to March first, 1913. There were also some cash dividends declared in the early part of 1913 out of earnings prior to March first of that year. They amount to a little over $5,000, about $5,800. There was $9,000 in dividends declared up to May of that year, but part of that, or about half of it was paid out of current earnings and the amount as set up in the revenue agent's report on which additional tax was assessed is about $5,800 paid out of the previous earnings. Now the tax involved here is an [fol. 14] additional assessment that was paid in the fall of 1923 in the sum of $8,610.84. The evidence will show the tax payer, Mr. Tucker, in making his returns in 1921 showed his income as he claimed it exclusive of any profit in the liquidation of the Osage Mercantile Company. The Collector on his return stated that the tax was erroneously calculated. The earnings, in that the earnings in the partnership were listed as dividends in a corporation and were not subject to the normal tax of eight per cent. If they had been dividends they would not have been subject to this tax but being earnings in a partners-ip, as the facts were they were subject to the tax. That made an additional tax liability of $1,968.71. The tax shown and paid on his return was $5,172.93, so that his true tax liability on his return was $7,141.63. The total tax payments, the first assessment and the additional assessment aggregated $13,783.76, and deducting the admitted tax liability of plaintiff on that makes $6,642.13 which is the amount in controversy here. That is the maximum amount of recovery with interest from date of payment which is October 30, 1923. Now the claim for abatement and refund was duly filed, and after this suit was filed in April of this year, the Commissioner wrote a letter to the tax payer stating he was allowed a refund of $216 and some cents on a retake it that is a minimum of recovery which the tax payer is entitled to.

In regard to the amounts distributed in the dividends, it is the contention of the plaintiff that those dividends cannot be used to reduce the March first value of the stock. They cannot be treated as liquidating dividends, the corporation continuing in business, the same officers at the same place and continuing a profitable business down to July 1920. If on the other hand as stated by counsel—this indicates to me a new angle in the case—I had not known of that position until counsel stated it—if it is to be considered that this real estate was not actually a dividend, only just a transfer of the property to the same persons in another form, to form another corporation, and they are deemed as still holding it, then in that event it cannot be taken into account as having been realized upon, and they cannot be charged with having received the value of that real estate in the liquidation of the March first value of the stock, so I take it on either view of the nature of that real estate distribution that the proposition of law we contend would be the same. That that was not a realization at all of March first value. The remaining question will be as to good will. This corporation earned quite large profits in proportion to [fol. 15] its capital. Organized in 1902, it started with $15,000 capital in 1902. In 1906 that was increased by a stock dividend to $30,000, a hundred per cent dividend being declared, and its earnings from the period of its organization to March first, 1913 on a capital of $30,000 for the entire period would exceed 50 per cent, taking into account appreciation in value of the real estate. It is claimed it had a good will value then and that it had a good will value at the time of liquidation. The evidence may show those good will values were substantially the same, but it will be contended for the plaintiff that good will is not an asset that can be distributed to stockholders in liquidation of a corporation and they made chargeable with the value of it. That when a corporation liquidates its good will may not be sub-divided among its several stockholders whether they be two or more and be treated as having been received by them in liquidation. This was a liquidation and distribution in kind. The assets were not sold but were taken over by the stockholders consisting of merchandise, furniture and fixtures and so forth, and not converted into cash and distributed, but it was distributed in specie or in kind. I think that covers the plaintiff's contention.

W. C. TUCKER, the plaintiff, was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. You may state your name.
A. W. C. Tucker.
Q. You are the plaintiff in this action?
A. I am.
Q. Where do you reside?
A. Pawhuska, Oklahoma.
Q. How long have you lived there?
A. Since 1888.
Q. What is your business?
A. I am a merchant.
Q. Have you been in the mercantile business all that time?
A. Yes, sir. As a clerk and later as an owner.
Q. Were you one of the organizers of the Osage Mercantile Company?
A. Yes, sir.
Q. When was it incorporated and started in business?
A. In 1902.
Q. What was its capital stock to begin with?
A. $15,000.
Q. Was that capital stock afterwards increased?
A. It was increased to $30,000 in 1906 by a stock dividend.
Q. A stock dividend of 100 per cent?
A. Yes, sir.
Q. Declared from earnings up to that time?
A. Yes, sir.
Q. Was its capital stock ever increased after that?
[fol. 16] A. No, sir.
Q. Remained at $30,000?
A. Yes, sir.
Q. Up to March 1st, 1913, what was the percentage approximately of the earnings of the company from the period of its organization to that date?
A. I think it would run better than fifty per cent on a capitalization of $30,000.
Q. Fifty per cent per annum on $30,000?

A. Yes, sir.

Q. In arriving at that do you take into account the appreciation in value of real estate?

A. Yes, sir.

Q. Had the company acquired real estate from 1902 to 1913?

A. It had.

Q. Where was that real estate situated?

A. In Pawhuska.

Q. Had it acquired it at the same time or at different times?

A. At different times. The bulk of it was acquired in 1916, at what we call the town lot sale, at the time the Osage Indian lands were allotted and town lots were sold.

Q. Some of it was acquired later?

A. Yes, sir.

Q. Was it in several different tracts?

A. Yes, sir.

Q. Now what was the cost of that real estate as carried on the books of that corporation?

A. When?

Q. Well, on March 1st, 1913?

A. $50,150.

Q. Was there any indebtedness against it?

A. Yes, sir, $10,000.

Q. Then the net investment in real estate on that date was $40,150?

A. Yes, sir.

Q. Now have you examined the revenue agent's report of an investigation of your tax liability made under date of June 5th, 1922, a carbon copy of which was furnished you?

A. Is that what is known as the Dye report?

Q. Yes.

A. I have.

Q. It was made by Mr. Dye as revenue agent?

A. Yes, sir.

Q. Sydney O. Dye, isn't it? It shows to have been made September 1st by the inspector and transmitted by the revenue agent in charge at Oklahoma City. Now that report in Schedule 1-B shows capital and surplus March 1st, 1913, $107,059.91. Is that correct as shown by the books?

A. It is.

Q. In that statement of capital and surplus the real estate is included at its book value?

A. Yes, sir.

Q. Now Mr. Tucker, were any dividends declared soon after March first, 1913?

A. Yes, sir.

Q. What were they?

[fol. 17] A. On March 4th, there was a dividend of $3,000.

Q. Was that paid in cash?

A. Yes, sir.

Q. And this Schedule 1-B of the agent's report I refer to shows dividend 4-1-13. That would be April first?

A. Yes, sir, $3,000.

Q. In cash?

A. Yes, sir.

Q. And another dividend on 5-8-13. That would be May 8th of $3,000?

A. That is correct, $3,000 cash.

Q. Those were distributed in cash.

By the Court: That is three dividends is it?

Mr. Garnett: Yes, sir; $3,000 each.

By the Court: What year?

Mr. Garnett: 1913. The first of those dividends was March fourth.

Q. Was any disposition made of the real estate in 1913?

A. Yes, sir. In May, 1913, the real estate was turned over to the stockholders of the Mercantile Real Estate Company who were the same stockholders as the Osage Mercantile Company, the merchandise end of it.

Q. Was that under date of May 13th?

A. Yes, sir.

Q. 1913?

A. Yes, sir.

Q. What was the Mercantile Real Estate Company?

A. The Mercantile Real Estate Company was a corporation authorized to do business in the State of Oklahoma for the purpose of owning and operating in real estate in Oklahoma.

Q. Who were the incorporators and stockholders?

A. W. S. Mathews, W. T. Mosier, G. W. Hutchins, J. M. Ferguson, R. W. Tucker, my brother, and myself.

Q. Were those men you named the same men who were stockholders in the Osage Mercantile Company?

A. They were.

Q. Did they receive stock in the Mercantile Real Estate Company in the same proportion as their stock holdings in the Osage Mercantile Company?

A. Yes, sir.

Q. What was done with the item of real estate on the books of the Osage Mercantile Company?

A. It was closed by charging it to undivided profits.

Mr. Toomey: Are those books in the court room?

A. Yes, sir.

By Mr. Garnett:

Q. Was the real estate itself deeded by the Osage Mercantile Company to the Mercantile Real Estate Company?

A. It was.

[fol. 18] Q. Do your books show the distribution of that real estate value as a dividend?

A. They do, yes, sir.

Q. The amount was carried to undivided profits on the books of the Osage Mercantile Company the same as other dividends?

A. Yes, sir.

Q. And credited to the real estate account?

A. Yes, sir.

Q. I hand you this book, General Ledger No. 4, and ask you to state if that at page 285 shows the undivided profits account of the Osage Mercantile Company?

A. It does.

Q. And under the section headed 1913, what does it show there?

A. It shows on March 4th a cash dividend of $3,000, April first a cash dividend of $3,000; on May the 8th a cash dividend of $18,000 and on May 13, a charge to real estate of $25,150.

Q. What makes up that charge on May 8th of $18,000?

A. It was made up of $3,000 cash dividend to which I have before referred and the $15,000 considered as real estate that was transferred to the Mercantile Real Estate Company.

Q. Then those dividends you have read from this account show a distribution of $9,000 cash and $40,150 real estate up to May 13th of that year?

A. Yes, sir.

Q. The revenue agent's report to which I referred contains computations on the cash dividends, showing the amount of each dividend that was paid out of current earnings and the amount that was paid out of earnings or surplus on hand at March first 1913 does it not?

A. Yes, sir.

Q. The report shows as distribution from surplus earned prior to March first, 1913 including cash and real estate both the total sum of $45,946.53. Is that correct as shown by your books at that time?

A. The dividends as mentioned are correct. The $9,000 and $40,150 real estate.

Q. Then the amount of cash distributed from current earnings and the amount from earnings prior to March 1st, 1913 are a matter of computation here aren't they?

A. They are, yes, sir.

Q. Does it appear here how the agent arrived at the amount of current earnings?

A. Yes, sir. I think he took the amount earned for the year and divided it by 365 and arrived at the earnings per day, $48.41 per day.

Q. That was current earnings per day?

A. That was his computation.

Q. In the first dividend he determined the amount of current earnings distributed by taking the daily earnings [fol. 19] from March first 1913 to the date of that dividend and applying it on the dividend?

A. Yes, sir.

Q. And the remainder he took from the cash on hand at March first, 1913?

A. Yes, sir.

Q. And the next dividend he took the daily earnings from the date of the first dividend and the second dividend and treated it in the same manner?

A. Yes, sir.

Q. And so on in the third dividend?

A. Yes, sir.

Q. And if the method is correct the agent's figures as to distribution from surplus earned prior to March first, 1913 in money and real estate of $45,946.53 is correct is not?

A. It is correct if that theory is sound.

By The Court: What report were you reading from?

Mr. Garnett: The Revenue Agent's report.

By The Court: Where did you get it?

Mr. Garnett: The witness stated it was a carbon copy of the original report.

By The Court: Who did you make your report to?

Mr. Garnett: He made it to the Commissioner of Internal Revenue.

Mr. Toomey: This additional tax was predicated in the first instance upon an investigation made by the field agent out of Oklahoma City. In fact, the principal features of that report are agreed upon here in order to get into the record the legal question involved.

Mr. Garnett: This evidence is just for a matter of record largely. I don't think there is any controversy over any of it at this moment. This report which I referred to is one transmitted by G. C. Holding, internal revenue agent in charge under date of July 17th, 1922 to the Commissioner of Internal Revenue, and the copy I have in my hand is a carbon copy furnished the taxpayer by the agent at the time he concluded his examination.

By Mr. Garnett:

Q. Now in this agent's report, Schedule 1-B, is set up the assets of the corporation at the date of liquidation in the sum of $133,391.68. Is that amount correct as shown by the books of your company at that time?

A. I think it is, substantially so.

Q. What was the date of liquidation Mr. Tucker?

[fol. 20] A. July 20th, 1920.

Q. Did the corporation continue in business from March, 1913 until the date you have mentioned July 20th, 1920?

A. Yes, sir.

Q. Was it of the same nature that had been engaged in before?

A. Yes, sir.

Q. What was that?

A. Selling general merchandise at retail.

Q. At the same location?

A. The same location, yes, sir.

Q. That was on one of the main streets in the City of Pawhuska in this state?

A. Yes, sir.

Q. Did the corporation make annual return of its income for taxation from 1913 to 1920 inclusive?

A. Yes, sir.

Q. Had it made return prior to that date?

A. Yes, sir.

Q. When did you begin making returns?

A. When the law was enacted.

Q. Did you make returns under the 1909 law?

A. Well, it was in 1909 or 1910; back there somewhere.

Q. That is the old corporation excise law?

A. Yes, sir.

Q. Did you personally make return of your income?

A. Yes, sir.

Q. For 1913 and every year since?

A. Yes, sir; and the later years with the help of accountants.

Q. The first years you would make it yourself?

A. Yes, sir.

Q. In later years you have had to have expert help. Now Mr. Tucker, were there outstanding tax liabilities of the corporation at the date of liquidation in July, 1910?

A. Yes, sir.

Q. Assumed and paid by the stockholders?

A. Yes, sir.

Q. Do you have the total of that amount?

A. Yes, sir, I have.

Q. How much was it?

A. $37,565.89.

Q. What makes up that total, what items?

A. The amounts due for Federal income taxes, capital stock tax for 1920 and 1920 ad valorem taxes to the county.

Q. The advalorem taxes were local county and state Taxes?

A. Yes, sir.

Q. The other taxes were all Federal taxes?

A. There were $34,925.20 Federal Taxes.

[fol. 21] Q. Were part of those additional assessments on the corporation for prior years?

A. Yes, sir.

Q. Those assessment were made after investigation or examination by an agent?

A. Yes, sir.

Q. Have you deducted those taxes from the book value as shown in the agent's return to see what the net realization was?

A. Yes, sir, I have.

Q. What is the net?

A. $95,825.79.

Q. That was the net assets realized by the stockholders on liquidation?

A. Yes, sir.

Q. Now who were the stockholders at that time Mr. Tucker?

A. At the time of liquidation?

Q. Yes, sir.

A. My brother and myself each owning one half the stock.

Q. Did your brother acquire any stock that year, the year of liquidation?

A. Yes, sir, he did.

Q. Whose stock did he get?

A. He bought the Hutchens stock and bought the stock of Mr. Mathews estate and Mr. Mathews having died, and he bought Mrs. Ferguson's stock, Mr. Ferguson having died a few years previous.

Q. And also four shares from you?

A. Four shares from me to equalize the stock.

Q. All that stock was acquired in 1920?

A. Yes, sir.

Q. These persons you have named were stockholders continuously from prior to 1913 until the year 1920?

A. Yes, sir.

Q. Mr. Tucker, would you say that the stock of the Osage Mercantile Company had a good will value in excess of its asset value based on its earning capacity and conditions as they existed at Pawhuska March first, 1913?

A. Yes, sir, I would.

Q. I believe you testified its earnings were in excess of fifty per cent a year on $30,000 of capital stock from its organization?

A. Yes, sir.

Q. What would you say would be the value of that good will per share?

A. That is a hard question, but I think it would be at least a hundred dollars a share.

[fol. 22] Q. At least a hundred dollars a share would be the good will value. What were business conditions at Pawhuska at that time?

A. Business conditions were good.

Q. Had the town of Pawhuska grown rapidly during the preceding periods since the corporation was organized?

A It had and in 1913 it was in very prosperous condition and in a growing condition. The oil development of Osage county was showing up and business prospects were good.

Q. Do you know what percentage of increase in population the city had from 1910 to 1920?

A. The Federal census report I think shows something like 230 per cent; something over that probably.

Q. Now about what had been the earnings of the corporation prior to liquidation in 1920 for a period of four or five years approximately?

A. Well, after income taxes were paid approximately around an average of $25,000.

Q. That much annual income?

A. Yes, sir, after these tax assessments were paid.

Q. That would be about 83⅓ per cent on $30,000 capital stock?

A. Yes, sir.

Q. Had the corporation at that time increased its surplus and had a larger capital invested in its business than it did in 1913?

A. Yes, sir, after the real estate was taken out.

Q Were conditions, business conditions normal during the years 1916, 1917, 1918 and 1919?

A. No, sir, beginning with 1916 they were abnormal—extra prosperous.

Q. That was during the war times?

A. War times.

Q. Then the earnings during that period you would say were abnormal earnings?

A. Yes, sir.

Q. In 1920 was the situation such you could reasonably expect to continue the same rate of earnings?

A. They were not.

Q. Would you say that the stock had a good will value at the time of liquidation in 1920?

A. Would I say it had?

Q. Yes, sir.

A. I think it had.

Q. Was that any larger or any less than it had in March first, 1913?

A. I don't think it was as good in 1920 as it was in 1913. [fol. 23] Q. You think the good will value was probably less?

A. I think so.

Q. Could you give an opinion as to how much less in dollars?

A. It would be hard to say in dollars, but I know it wasn't as good.

Q. At least if there was a good will value of $100 in 1913 there was no greater good will value in 1920?

A. No, sir. I know there was no greater. May I give some reasons there?

Q. Yes, sir.

A. Well, Mr. Mosier was a member of the Osage tribe and influential and he was out of our organization. Mr. Mathews was likewise an Osage and he was dead. Mr. Ferguson, who was with us in 1913, was an old time trader, had known the Indians since the days of the buffalo hunt, and he was dead. Competition had increased wonderfully and it was a question of the survival of the fittest which did not apply in 1913.

Q. The business competition was keener?

A. Much more so. Prosperity of the town had brought it all in there.

Q. Now what was done with the assets of the corporation in 1920 when it liquidated?

A. My brother and I took the merchandise and the accounts over and set it up on the books, a new set of books as a partnership.

Q. Under what name did you operate?

A. We operated under the name of Osage Mercantile Company as a co-partnership.

Q. That is the same name as the corporation which had been liquidated?

A. Yes, sir.

Q. Did you continue the same kind of business?

A. Yes, sir.

Q. Did you use the same building and location?

A. Yes, sir.

Q. Did the corporation own this building on March first 1913?

A. It did.

Q. The Osage Mercantile Company?

A. The Osage Mercantile Company, yes, sir.

Q. Did the corporation own it at the time of liquidation?

A. It did not.

Q. It had been included in this distribution of real estate in 1913?

A. In 1913 is right.

[fol. 24] Q. And your partnership in 1920 has been conducting that business in a rented building?

A. We rented from the Mercantile Real Estate Company.

Q. You stated the value of these assets based on the figures given in the agent's report that you say are correct from the books after deducting the taxes outstanding, $95,825.78 as the value of the assets distributed. How much was that per share? $319.42 counsel says. Now referring to the March first value before liquidation, the figures you gave on that were $356.86 a share.

A. I have it in round numbers $357. $356. what?

Q. $356.86.

A. I presume that is right. That is on the agent's figures, not taking into consideration the actual value of the real estate.

Q. Not taking into account the appreciated value of the real estate. Those figures then show a higher value on March first than was realized on liquidation in July 1920 of about $37.00 per share does it not?

A. I think that is correct; something like $37.00.

Q. $37.86 less per share at liquidation than March first value.

Cross-examination.

By Mr. Toomey:

Q. Have you the minute books here in court?

A. Yes, sir.

Q. Where did you do your banking up at Pawhuska along about the time of this real estate deal? I mean along about May 8th or May 13th, 1913?

A. Probably the First National Bank and if the Citizens National Bank was in existence we may have been doing some with them.

Q. When did you first decide to form this real estate company?

A. Well, we talked of it about the time we found out the information on the Oklahoma law.

Q. When was that?

A. I don't know when that was; along about that time.

Q. Well, how long before?

A. Oh, considerably before.

Q. Before March first?

A. Yes, sir.

Q. How was this real estate transferred? How was the transaction?

A. Well, the transaction was simply that the real estate was deeded to the Mercantile Real Estate Company and the [fol. 25] stock of the Mercantile Real Estate Company was issued to the stockholders.

Q. Were you the president of that company at that time?

A. Yes, sir.

Q. Isn't it a fact you went over to the bank, you and the other stockholders and borrowed some money about that time in connection with that transaction?

A. If we did I don't remember it.

Q. Didn't you go to the bank and borrow $15,000?

A. I don't remember it if I did.

Q. Would your books show it if you did?

A. I think they will, yes, sir.

Q. When you formed this corporation you subscribed to stock in the new corporation didn't you?

A. Yes, sir.

Q. What did you pay for that stock with?

A. We paid the real estate.

Q. You don't recall then borrowing money from the bank at that time?

A. No, sir.

Q. And paying it into this new real estate corporation for stock?

A. No, sir, I don't.

Q. And then transferring the real estate to the new corporation in exchange for that $15,000?

A. No, sir I do not.

Q. You didn't do that at all?

A. I won't say I didn't do it.

Q. Then the $15,000 was distributed to the stockholders of the Osage Mercantile Company. Isn't that what the transaction was and then you went over to the bank and took up the note with the $15,000?

A. If that is a fact I don't remember it. All I know is the transaction there on the books. The sum and substance of it all was we took the real estate and put it in the other company, and took the stock of the other company for the real-estate.

Q. What was there on the books of the old company to show for that?

A. Just as I have testified to here.

Q. Taking it at the other end. At the time of liquidation the business was continued as a partnership?

A. Yes, sir.

Q. Under the same name, the Osage Mercantile Corporation?

A. Yes, sir.

[fol. 26] Q. Did you advertise to the public the fact that there was going to be a change?

A. We advertised that there was a change.

Q. How?

A. We advertised it had been changed.

Q. To what extent?

A. Publicity in the newspapers.

Q. What kind of publicity did you give to that fact?

A. Well, I think in our advertisements we made it a point and in our stationery and letter heads we made it a point to say it was Osage Mercantile Company, a co-partnership. Our letter heads are all marked that way.

Q. You were speaking of good will. What do you mean by good will Mr. Tucker?

A. Well, the attitude of the buying public towards an institution.

Q. When you say that good will increases the value of stock one hundred dollars per share what do you mean by that?

A. I mean the fact that we were there and a going concern and had been for years; members of the Osage tribe, influential members of the Osage tribe as members of the corporation and giving it their co-operation and the prestige we had from the fact they were there gave us that good will.

Q. Why do you say it is a hundred dollars a share instead of $500 a share?

A. If I was buying it I wouldn't give more than that.

Q. How would you measure it?

A. My own judgment and knowledge of conditions.

Q. In 1920 you had been there longer hadn't you?

A. Yes, sir.

Q. Oil had developed all around there?

A. Yes, sir.

Q. You were making larger earnings in 1920 than you were in 1913 weren't you?

A. We were on capital stock but not on capital invested.

Q. Your earnings for 1919 were over $34,000, weren't they?

A. Please take off the Federal liability. We paid $16,125.35 Federal income tax that year; that is, on that year.

Q. That is 1919?

A. Yes, sir.

Q. 1918 your net income was about $42,000.

A. Our income tax for that year was $30,097.23.

Q. What was it for 1917?

A. $15,292.45.

Q. That was your income tax?

A. Yes, sir.

[fol. 27] Q. Your net earnings for that year were over $51,000?

A. For 1917?

Q. Yes.

A. Are you sure you are looking at 1917?

Q. Yes, sir. Now didn't these earnings include or exclude rather, the deductions after income taxes had been

paid? This earnings for 1919 of $30,264.00. Isn't that net after taking out the income tax?

A. It is net after taking out $9,981.70 which we paid on the 1917 tax.

Q. Taking out how much?

A. You are talking about 1917?

Q. No, I am talking about 1919. Isn't that $34,000 net after taking out your income tax?

A. It is after taking out the income taxes of previous years.

Q. So you would make or were making that year over a hundred percent on your investment.

A. I beg your pardon * * *

Q. Generally speaking the same conditions relative to good will, that is, your position in the community, the benefit of being established for a long time would make your good will in 1920 better than it was in 1913 wouldn't it?

A. I beg to differ. I think it was less for the reasons I stated before.

Q. What were your reasons?

A. Well, Mr. Mathews was out of the organization. Mathews was dead. Ferguson was dead. Competition had increased to a point where it made things very strenuous. Altogether different from what it was in 1913.

Q. When was the biggest oil development around Pawhuska, up in the Osage Country?

A. It was probably from 1916 up to 1920.

Q. That is when there was the greatest development around there?

A. During that period.

Q. The outlook in 1919 and 1920 was that production was going to increase * * *

A. Business conditions in 1920, if you remember, were bad.

Q. I mean as to oil development.

A. Oil development had a black eye. Oil had been three dollars and a half and had gone down to a dollar and a quarter.

Q. As to the development and production of oil it was prospective wasn't it?

A. Yes, sir.

[fol. 28] Q. And as the oil production increased there your profits were greater weren't they?

A. No, sir.

Q. In dealing with those Indians as the Indians became wealthy from oil production your business flourished accordingly didn't it?

A. As the Indians became wealthy from their oil royalties and bonuses they spread to the four winds of the [campus] and so did the trade.

Q. But there were a good many of them up there?

A. Some of them are there yet?

Q. You spoke about the sale of four shares of this to your brother. What was that?

A. I sold him four shares.

Q. How much a share?

A. $450.00.

Q. When was that?

A. It was in July 1920 I think; about that time.

Q. July 1920.

A. Sometime previous to the liquidation; a short time before.

Q. What was the par value of that stock?

A. $100.00.

Q. You bought out Mosier's stock along in 1913 didn't you?

A. January 30th, 1914.

Q. How much per share?

A. We paid him $200 in money and made an agreement with him that went on down through the years for a certain discount on his purchases.

Q. You stated that the net earnings from 1902 to 1913 were about fifty per cent on your investment?

A. I think approximately, yes, sir.

Q. Is that a correct statement of the earnings of the company for those previous years?

A. I included the appreciated value on the real estate in my estimate.

Q. What does this represent?

A. This represents the book earnings I think.

Q. This represents the actual earnings of the company as taken from the books?

A. Outside of the appreciation of the real estate, yes, sir.

Q. And this for only five years shows net earnings, average yearly earnings of 40.95 per cent. That is what is shown by the books?

A. Well, take the appreciated on the real estate and it shows more.

Q. How did it come you sold your brother stock at $400 a share when you say it was worth less then than it was in 1913.

[fol. 29] Mr. Garnett: He didn't say that. Objected to for the reason he never said it was worth less. He testified as to the value on liquidation as shown by the agent's report and that the good will value was not any larger.

The Court: Let him answer.

Mr. Toomey: He testified the value of this stock in 1920 was $319.40. That is all except we want to see those minute books.

Redirect examination.

By Mr. Garnett:

A. I haven't answered that question yet.

Mr. Garnett: Go ahead.

A. I beg to differ with you on your statement of my fixing that value. I sold my brother the stock, those four shares that I had in excess of half the stock in order that he might own half the company.

By Mr. Toomey:

Q. You put a value of $450 on that didn't you?

A. Yes, but if he hadn't been my brother he wouldn't have got it.

Redirect examination.

By Mr. Barnett:

Q. Mr. Tucker, before dissolving the Osage Mercantile Company you had to advertise and public- notice of that fact in a paper in your home county did you not?

A. I can't say we did it before dissolving.

Q. Well, as a matter of law.

A. But as a matter of law we had to give notice and had to go through some proceedings to dissolve and had to go

through some publication in order to get the partnership going. It was all a matter of public record.

Q. The notice by publication was given as required by law for the dissolution of the corporation by court decree?

A. I remember it ran quite awhile.

Q. You also gave notice as required by law for a partnership under a name not indicating the members of the firm didn't you?

A. I think we indicated the members of the firm too.

Q. In your advertisement?

A. Yes, sir.

Q. But the law requires advertisement where the name of a partnership does not contain the names of the members of it, and you complied with that law?

A. Yes, sir.

[fol. 30] Q. Counsel asked you as to the basis for good will. Primarily earning capacity is what it is based on is it not?

A. I think so.

Q. In reference to the earnings prior to 1913; those years, 1910, 1911 and 1912 were a period of hard times in Oklahoma weren't they?

A. As shown by the books they were lean years.

Q. That was a period of business depression all over the country?

A. Yes, sir.

Q. The years just prior to 1920 were years of abnormal business prosperity?

A. Yes, sir.

Q. So that in 1913 you had passed the lean years and were starting on prosperity. In 1920 you had passed the prosperous years and were facing a decline?

A. That is the way it looked.

Q. Have you the total figures of the total taxes paid by this corporation for 1917, 1918, 1919 and 1920?

A. Yes, sir.

Q. Will you give those?

A. You mean Federal income taxes?

Q. Yes, sir.

A. 1917, $15,292.45; 1918, $30,097.23; 1919, $16,125.35; 1920, $8,603.81.

Q. That is all.

(Witness excused.)

A. N. RUBLE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.
A. A. N. Ruble.
Q. Where do you live?
A. Pawhuska, Oklahoma.
Q. How long have you lived there?
A. Twenty-three years.
Q. What is your business?
A. Banking.
Q. What bank are you connected with?
A. The First National Bank.
Q. Do you know the Osage Mercantile Company?
A. Yes, sir.
Q. You were there when it was organized and started in business?
A. Yes, sir.
Q. Do you know the nature of its business down to March first, 1913?
A. In a general way, yes, sir.
[fol. 31] Q. Were you acquainted with business conditions existing at that time, and the prospect for business at that time?
A. Yes, sir.
Q. Mr. Ruble, if a corporation had earned fifty per cent annually on a capitalization of $30,000 up to that date, and had on hand assets including certain real estate, including the property in which it was transacting business, would you say its stock had a good will value based on earning capacity in excess of the estate value?

Mr. Toomey: Objected to. I don't think the witness has shown himself qualified to answer any such question as that.
The Court: I think you should qualify him.

Q. What business have you been engaged in during the time you have lived in Pawhuska?
A. Banking business.

Q. In the banking business are you called upon to pass on the value of securities in one form and another?

A. I am.

Q. The values of properties?

A. Very frequently.

Q. Are you required to pass on the value of property based on the earning capacity.

A. Yes, take it in all its different phases.

Q. That is one element of value?

A. Yes.

Q. Are you aware of the real estate this concern owned on March first, 1913?

A. Yes, sir.

Q. Are you qualified to say what would be the good will, if any, on the stock of this corporation at that time?

Mr. Toomey: Objected to as he has not qualified as a real estate man, nor has he qualified as a man familiar with the mercantile business, and it is far fetched to ask a banker any such question as that.

The Court: He is not asking the ultimate question. He is trying to lay the predicate.

Mr. Toomey: Calls for a conclusion also.

The Court: Go ahead.

A. I don't think I could fix an exact figure but I could approximate it, based on transactions of this nature; considering them.

Q. Were you famil-ar with real estate values in Pawhuska at that time?

A. Yes, sir.

Q. Is it a necessary part of your business to know real estate values?

A. Yes, sir.

[fol. 32] Q. Now Mr. Ruble, this corporation having earnings in excess of 50 per cent annually on $30,000 of capital stock from 1902 to 1913 and owning the real estate with which you are familiar and the conditions existing in Pawhuska at that time as a growing city and the outlook for future business, what would you say would be approximately the good will value on the stock of the Osage Mercantile Company at that time?

A. I think it would be from a dollar to a dollar and a half.

Q. You mean from $100 to $150 a share?

A. Yes, sir, on the basis of a hundred dollar certificate.

Q. On a dollar of stock it would be from one dollar to a dollar and a half?

A. Yes, sir.

Q. Were you equally familiar with its good will value in July 1920 when it liquidated?

A. I think I was.

Q. What would you say as to its good will value then?

A. I wouldn't alter the figures very much; approximately the same.

Cross-examination.

By Mr. Toomey:

Q. It is highly speculative isn't it?

A. No, not hardly so. Of course, there is speculation in all these matters.

Q. Doesn't the personal element enter into that a good deal, depending a good deal upon the men who are running that store?

A. Well, I think that would be an asset.

Q. Don't you think it would be one of the biggest assets in a business of that kind?

A. Surely, the management has a great deal to do with those things, the location and value of the property and all those things enter into it.

Q. Suppose Tucker had been taken out of that business would that have substantially affected the good will?

A. I couldn't say, because he might be replaced by a better man or a worse one.

Q. You think it would depend a good deal in the standing in the community of the men who took their places?

A. Yes, sir, it would.

Q. Your conclusion in the matter is simply that the good will value was approximately the same in 1920 as it was in 1913?

A. Yes. I don't think it was materially different.

Q. Don't you think the oil development up there would increase the outlook at that time?

A. I don't know that I get your question.

Q. There was a big oil development along in 1920 and prior years wasn't there?

A. Yes, sir.

[fol. 33] Q. Wouldn't that increase the outlook and earnings of an old established concern there?

A. Well, I don't think it did because other towns grew up and the competition was scattered, and the Indians left there and went other places. As they got more money they moved to California and Wichita and various other places. I don't think it very materially increased the business.

Q. How about the banking business?

A. The banking business increased materially.

Q. How about the other lines of business there, real estate?

A. Real estate is pretty good, pretty good business, in 1920.

Q. How about professional lines, didn't they increase?

A. Yes, sir.

Q. Everything save the mercantile business?

A. No, I didn't make that statement. I said it was more scattered.

Q. You were acquainted with the Tuckers along in 1920 weren't you?

A. I was.

Q. Would you say their changing from a corporation to a partnership under the same name would cause them any loss on account of good will?

A. No, I think not.

H. J. SMITH was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. H. J. Smith.

Q. Where do you live?

A. Pawhuska.

Q. How long have you lived there?

A. Sixteen years.

Q. How long had you lived there prior to March first, 1913?

A. 1906, or 1909; three years.

Q. What has been your business?

A. Farm loans and real estate.

Q. Are you acquainted with Mr. Tucker and his brother?

A. Yes, sir.

Q. R. W. Tucker?

A. Yes, sir.

Q. Are you acquainted with the stockholders and owners of the Osage Mercantile Company along in 1913?

A. Yes, sir.

Q. Were you acquainted with the business?

A. Yes, sir.

Q. Engaged in the mercantile business are they?

[fol. 34] A. Yes, sir.

Q. Were you acquainted with the real estate that they owned at that time?

A. Yes, sir.

Q. Did you know real estate values there at that time?

A. Yes, sir.

Q. Are you acquainted with the business conditions existing there at this time?

A. Yes, sir.

Q. Do you write insurance in connection with your loan business?

A. Yes, sir.

Q. In your loan business do you have occasion to determine the value of securities or property in which earning capacity is an element of value?

A. Yes, sir.

Q. And would you say you could state what would be the good will value on the stock of the Osage Mercantile Company at March first, 1913 if you were acquainted with its earnings for the previous period?

A. Yes, sir.

Q. Assuming that the stock had earned in excess of fifty per cent on $30,000, capital for a period from 1902 when it was organized until March first, 1913, and with the real

estate it owned and business it had and business conditions, as they were known to you at the time, what would you say would be its good will value?

A. A dollar and a half.

Q. That is a dollar and a half good will value above par value of stock?

A. Yes, sir.

Q. If the par value of the stock is a hundred dollars a share that would be $150.00.

A. Yes, sir.

Q. Were you equally acquainted with the facts and circumstances surrounding it and its good will value in 1920?

A. Yes, sir.

Q. What would you say as to its good will value then?

A. A dollar and a half.

(Witness excused.)

R. W. TUCKER was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. R. W. Tucker.

Q. Where do you live?

A. Pawhuska.

Q. What is your business?

A. Mercantile.

Q. You are a brother of the plaintiff, W. C. Tucker?

A. Yes, sir.

Q. Were you in the Osage Mercantile Company when it was organized?

A. Shortly afterwards.

[fol. 35] Q. And been a stockholder in it until its liquidation?

A. Yes. sir

Q. Were you familiar with its property and business and earnings up to March first, 1913?

A. Yes, sir, I think so.

Q. Are you able to say what the good will value, of the stock, was at that time?

A. Well, I would say from $150.00 to $200.00 a share.

Q. You can say whether you know what its good will value was approximately?

A. Yes.

Q. It had earned something in excess of fifty percent on $30,000 up to that time had it not?

A. I think so.

Q. Now it would be $100 to $150 a share. You were still a stockholder in 1920 when it was liquidated?

A. Yes, sir.

Q. What would you say as to its good will value at that time?

A. Well, in my estimation there wouldn't be much difference; be about the same.

Q. Had about as much good will value then as it did in 1913?

A. I think so.

Q. You were a stockholder who received liquidating dividends?

A. Yes, sir.

Q. Or assets in liquidation?

A. Yes, sir.

Q. And formed a partnership with the plaintiff under the name of Osage Mercantile Company?

A. Yes, sir.

Q. Still engaged in that business?

A. Yes, sir.

Q. Were you a stockholder in the Mercantile Real Estate Company?

A. Yes, sir.

Q. And still a stockholder in it?

A. Yes, sir.

Q. Does that company still own the real estate it received in 1913 by deed of conveyance from the Osage Mercantile Company?

A. Well, I think we own it all yet. We may have disposed of one piece, I don't know, but the majority of it we still own, yes, sir.

Q. Mr. Tucker, do you know how the real estate distribution in 1913, May 13th of that year was made to the Mercantile Real Estate Company?

A. Know how it was made you say?

Q. Yes.

A. Well, the Mercantile Real Estate Company was organized, and the stock was issued according to their holdings in the Osage Mercantile Company, the same amount or pro rata in proportion to their holdings. Is that what you mean?

[fol. 36] Q. Yes, sir. Then the real estate was deeded to the Mercantile Real Estate Company?

A. Yes, sir.

Q. The stock in it was issued to the stockholders of the Osage Mercantile Company in the same proportion?

A. The same proportion.

Q. As held in the Osage?

A. Yes, sir.

Q. Was that done by setting it up as a dividend on the books of the corporation?

A. Yes, sir.

Q. Was there any cash figured in that transaction?

A. Yes, sir.

Q. How was that?

A. The stockholders turned in their checks to the Osage Mercantile Company and they were afterwards paid out in dividends as I remember it.

Q. The transaction was had by exchanging checks?

A. Yes, sir.

Q. There was no consideration of value passed either way but just an exchange of checks as you say?

A. That is as I remember it.

Q. To what company did the stockholders give their checks?

A. The Mercantile Real Estate Company.

Q. Did the Mercantile Real Estate Company give its check to the Osage Mercantile Company, or do you know?

A. I am not clear on it. I don't remember.

Q. Then the Osage Mercantile Company gave its checks to its stockholders?

A. Yes, sir.

Q. For the same amount that went to the Mercantile Real Estate Company?

A. Yes, sir.

Q. Mr. Tucker, was that transaction handled in this way; the checks of the Osage Mercantile Company were issued to its stockholders in declaration of a dividend and those checks were turned to the Mercantile Real Estate Company in payment of its stock?

A. That is what I was trying to say.

Q. And the Osage then deeded the real estate to the Mercantile?

A. Yes, sir.

Cross-examination.

By Mr. Toomey:

Q. How much money passed over to the Osage Mercantile Company as a result of this transaction?

A. I wouldn't say.

Q. $15,000 wasn't it?

A. $15,000.

Q. The consideration for this real estate transfer was $25,000, altogether. Isn't that correct?

A. I don't remember. The books show.

[fol. 37] Q. $15,000 cash and assumed a $10,000 mortgage.

A. That is it, yes sir.

Q. You borrowed some money about that time didn't you?

A. We did not.

Q. The stockholders as individuals didn't do that?

A. No, sir.

Q. Why all this passing of checks back and forth around among the individuals to get this transferred from the Osage?

A. There was no checks among individuals. Checks into the company.

Q. Tell us in your own words what took place.

A. I can't do it. I don't remember.

Q. You don't remember whether this statement made by Mr. Garnett is correct or not?

A. Yes, sir, I think it was.

Q. What was that, what took place?

A. As I remember it the stockholders in the Mercantile Real Estate Company paid their checks in for the $15,000.

Q. Paid their checks to who?

A. To the Osage Mercantile Company for the real estate.

Q. Did you subscribe for any stock in the real estate Company?

A. Yes, sir.

Q. How much did you subscribe to?

A. Whatever my share was there.

Q. The same as you had in the other company?

A. Yes, sir.

Q. Did you pay the real estate company for that stock?

A. I did.

Q. How did you pay it?

A. Check.

Q. What did the real estate company do with that check?

A. They paid it to the Osage Mercantile Company.

Q. Then the Osage Mercantile Company paid that money back to you in the form of a check, is that right?

A. In the form of a dividend, yes, sir.

Q. Did you ever consider the matter of good will value—when did you first think of the good will value of that stock in dollars and cents?

A. Well, I don't know that.

Q. Just recently, before this trial?

A. Well, if a man has got something he wants to sell he sometimes thinks about what it is worth.

Q. Did you have occasion to consider the good will value of this stock back in 1913?

A. I probably would have if I had a purchaser.

Q. You didn't set it up on the books?

[fol. 38] A. No, you don't set good will up on the books.

(Witness excused.)

G. W. Hutchins was thereupon called as a witness by the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. What is your name?

A. G. W. Hutchins.

Q. Where do you live?

A. Neosho, Missouri.

Q. Did you live in Pawhuska prior to going to Missouri?

A. Yes, sir.

Q. How long did you live there?

A. About twenty-five years.

Q. Were you there in 1902 when this corporation, the Osage Mercantile Company was organized?

A. Yes, sir.

Q. Were you one of the original incorporators and stockholders?

A. Well, shortly afterward, yes, sir.

Q. You got in immediately after it was organized?

A. Yes, sir.

Q. Did you own your stock down until the year 1920?

A. Yes, sir.

Q. Were you a stockholder throughout the year 1913?

A. Yes, sir.

Q. Were you an incorporator and stockholder of the Mercantile Real Estate Company?

A. Yes, sir.

Q. That is the corporation that received the real estate owned by the Osage Mercantile Company by deed of conveyance in 1913?

A. Yes, sir.

Q. Can you tell the court the manner in which that transaction of the distribution of the real estate or conveyance of it was handled?

A. I don't know whether I can or not. I know the company was formed and they issued stock. There was a stock dividend as I understood it. I paid no attention to it much, no more than just declared a stock dividend as I think.

Q. A stock dividend in what company?

A. From the Mercantile to the Osage Realty Company.

Q. Then what was done with your stock?

A. We each one got our stock.

[fol. 39] Q. Distributed to the stockholders?

A. Yes, sir.

Q. Did you pay out any money at all in that transaction?

A. No, sir. I don't remember whether there was checks issued from the Mercantile Company to us for the real estate transfer or not. I don't know. I don't remember.

Q. Whether there were checks passed or not the net result was that without paying out any money you got stock?

A. I just took it as a dividend from the Mercantile company to the real estate company.

Q. You got stock in the Mercantile Real Estate Company in the same proportion you held stock in the Osage?

A. Yes, sir.

Q. And the real estate passed from the Osage to the Mercantile Company?

A. Yes, sir.

Q. Whether checks were exchanged back and forth you don't remember at this time?

A. I don't remember, if they were. There might have been and might not. I don't remember. Very likely there were.

Q. But you were not out any money in that transaction?

A. Not a nickle, any more than checks were issued—they might have been. I got several dividends, I don't remember; never paid much attention.

Q. Does the Mercantile Real Estate Company still own the real estate it got in that transaction?

A. Yes, sir.

Q. You are still a stockholder in them?

A. Yes, sir.

(Witness excused.)

W. E. McGuire was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. W. E. McGuire.

Q. Where do you live?

A. Pawhuska.

Q. How long have you lived there?

[fol. 40] A. Thirty years this last time; came there forty years ago and been there thirty years this last trip.

Q. What is your business?

A. At present it is real estate and loans and insurance.

Q. Have you been engaged in that business all the time during your last thirty years there?

A. No, sir. I was postmaster eighteen years and have been in the real estate, loan insurance business since 1916.

Q. You were there at the time of the organization of the Osage Mercantile Company?

A. Yes, sir.

Q. Were you acquainted with the real estate it owned on March first, 1913?

A. Yes, sir.

Q. Were you at that time familiar with the values of real estate in Pawhuska?

A. Yes, sir.

Q. Were you familiar with business conditions existing there at that time?

A. Pretty well, yes, sir, not as well as later. I guess I was in business. I owned a business outside of the postmaster job. I had another job.

Q. Assuming that the earnings of this company from its organization in 1902 with a capitalization of $15,000 had amounted to more than 50 per cent on a capital stock of $30,000 up to March first, 1913, could you with your knowledge of its property and business and business conditions say whether or not it had a good will value?

A. Yes, since I have investigated and found out what is supposed to be meant by good will value I should say that I could approximate the good will.

Q. What would you say would be the good will value of the stock in this corporation at that time under the conditions I have named?

A. Well, I would think about as given by the witnesses before me, from a dollar to a dollar and a half. Of course, it is approximate, any valuation we give is an approximation, as an approximate value, but it is my judgment, knowing the men and knowing the conditions that it would amount to from one dollar to a dollar and a half.

Q. Now were you equally familiar with the good will value in July 1920?

A. Yes, sir.

Q. What would you say as to its good will value then?

A. I wouldn't think it would be hardly so good.

Q. Why?

A. As has been stated before the members of the firm who passed out of the firm were influential men; two of [fol. 41] them were very influential among their people, the Osages, and I think that would make some difference. It seems to me it would be natural that it would.

Q. Was there any change in business conditions in 1920 as compared with 1913?

A. Conditions were not nearly so good for several years.

Q. That is, not so good in 1920?

A Not so good in 1920 as it had been—you mean back to 1913?

Q. Yes, sir.

A. Well, I don't—it might have been as good in 1920 as 1913, but in the intermediate years—the years between it had been very much better than in either of those years.

Q. That was during the war?

A. Yes.

Q. And business conditions were abnormally prosperous?

A. Yes, sir. They were abnormal in those years, of course.

Q. In 1920 it was getting back to normal?

A. Yes.

Cross-examination.

By Mr. Toomey:

Q. What do you mean by good will of the business?

A. As explained to me in trying to post myself in regard to this matter, I was informed it includes such items as the popularity of the firm and influence of the men connected with [*with*] the firm, the conditions of trade, the opportunity for influencing the trade and such things as that.

Q. Who gave you that information?

A. I got it from various persons to whom I had talked; part from the attorneys in the case, partly from other business men to whom I talked.

Q. You have never had any experience in valuing good will in connection with your business have you?

A I have heard it always in buying and selling that there was a good will influence went with it.

Q You are not a specialist in such matters?

A. No, sir.

Q. You are just an ordinary business man like all the rest of them?

A. Just an ordinary business man; very ordinary.

Q. You wouldn't consider your opinion on the matter of good will any more valuable than mine or my neighbor's would you if I were a business man at Pawhuska?

A. With the opportunity to know the conditions the same as I have known this I would say not.

[fol. 42] Q. Any of the old timers in Pawhuska would be just as qualified to talk about good will as you are?

A. I wouldn't say any of them. We have some there that can't speak English, and we have some Indians there who don't know very much about business, and some who know a good deal.

Redirect examination.

By Mr. Garnett:

Q. You understand that earning capacity enters into good will, and the established trade and custom, and the habit people have of going to a certain place to deal?

A. That is my understanding that is one of the items that enters into it.

(Witness excused.)

(Hereupon court recessed until nine o'clock A. M. June 13th, 1925, at which time all parties being present as heretofore, the trial of the above and foregoing cause was resumed, and further proceedings had as follows:)

W. C. Tucker was thereupon recalled as a witness and, having been previously sworn, further testified as follows:

Mr. Tooney: On yesterday during the cross-examination of this witness I asked two questions. One was with reference to the purchase of some shares of stock from Mr. Mosier I believe, in which it was answered it was $200 a share. I also asked another question with reference to the sale by Mr. Tucker to his brother of four shares at $450 a share. Those questions were asked with the idea of having some bearing on this good will question and not with the

idea of injecting into the case any question as to the value of this real estate. In order to simplify the issues I have concluded to withdraw my question, those questions from the record. I don't want to inject into this case any question of valuation. That will be agreed upon.

By the Court: Value of what?

Mr. Tooney: Value of the stock as of March first.

It will be agreed in this case that the valuation fixed by the Revenue Agent based upon the net worth is correct, and it isn't necessary to go into any increased value of that by showing the value of the real estate. That will be cleared up before the end of the trial and I think we will stipulate [fol. 43] these things definitely and eliminate that issue.

Mr. Garnett: In order that there may be no misunderstanding, I would like to say the revenue agent's figures are correct as to the asset value of the stock, but any question of good will that should enter into it will be determined upon the evidence. Before proceeding to examine the witness I wanted to ask leave of court to amend the petition. I should have done so yesterday, but hurried into this case, by changing the figures on line ten on page three from $356.86 to $203.71.

By the Court: You mean the valuation on the stock by the Commissioner?

Mr. Garnett: The figures in Line 8, yes, sir.

By the Court: I am asking you what the item is.

Mr. Garnett: It is alleged as valuation taken by the Commissioner on the stock. The figures in the petition are the assets value. I have reduced that by withdrawing the real estate and took a lower figure.

By the Court: You are talking about the valuation of March first, 1913 are you?

Mr. Garnett: Yes, sir.

By the Court: That is simply a mistake as to what the Commissioner did?

Mr. Garnett: Yes, sir. I understand counsel has no objection to that change.

Mr. Toomey: No objection to that amendment of the petition.

By the Court: You can make the amendment. It is a mistake of what valuation the Commissioner put on the stock at that date.

W. C. TUCKER, recalled, being previously sworn, further testified as follows:

Redirect examination.

By Mr. Garnett:

Q. You still own the stock in the Mercantile Real Estate Company which you received at the time that company was organized in 1913?

[fol. 44] A. Yes, sir.

Q. And does that company still own the real-estate which it received by conveyance from the Osage Mercantile Company at that time?

A. With the exception of one piece; probably two or three thousand dollars.

Q. There has been no change in your stock ownership in the Mercantile Real Estate Company, however?

A. Except the changes caused by the death of the original stockholders and the estates now hold it.

Q. But your individual stock?

A. No, sir, no change.

Q. No change in that?

A. No, sir.

Q Now referring to the Revenue Agent's report about which you were asked yesterday, and in Schedule B of that report, as testified yesterday, the agent deducted $45,946.53 from the March first asset value and then took the remainder as the asset value of that date. Is that correct?

A. Yes, sir.

Q. Now does that report show that after the deduction $61,113.38 was the asset value?

A. It does.

Q. And does that show for 300 shares of stock a value per share of $203.71?

A. The report shows that, yes, sir.

Q. And the division of this sum, net sum of surplus and capital prior to March first, 1913 by the 300 shares of stock outstanding produces this result of $203.71 which the agent used?

A. Yes, in his computation.

Q. Now using that as March first value, the cost of your stock, did the agent determine you a profit on the stock in liquidation?

A. He did.

EXHIBIT 1.

Page 1 of Return

Form 1040—UNITED STATES INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000, OR SEPARATE RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $5000

FOR CALENDAR YEAR 1920

Or for period begun ....., 19.. ..., and ended ....., 19....

IF RETURN IS FOR CALENDAR YEAR 1920 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1921

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

If the return is made for a period other than a calendar year, the dates of the beginning and ending of the period covered must be plainly stated in the space provided above.

PRINT PLAINLY NAME, STREET AND NUMBER, OR RURAL ROUTE, POST OFFICE, COUNTY, AND STATE

Mar 16 1921
Dist Oklahoma

W. C. Tucker

Pawhuska Oklahoma (303832)

CASH	
CHECK	
M. O.	
CERT. of IND.	

(DO NOT WRITE IN THIS SPACE)

Examined by 36th

Audited by

FIRST PAYMENT $1293.23

Cashier's Stamp

Collector of Internal Revenue
Paid Mar 16 1921
District Oklahoma

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1918 and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line.)

Sworn to and subscribed before me this 14 day of March, 1921.

W. C. Tucker
(Signature of individual or agent.)

J. W. Nutt, Notary Public
(Signature of officer administering oath.) (Title.)

(Address of individual or agent.)

1. Are you a citizen of the United States? Yes
2. If not, are you a resident of the United States?
3. If neither, of what country are you a citizen or subject?
4. Did you file a return for 1919? Yes
5. If so, what address did you give on that return? Pawhuska, Okla
6. To what Collector's office was it sent? (Give district or city and State) Oklahoma, Okla
7. Did you receive any adjustments during the taxable period on account of Government contracts through the operations of a claims board or otherwise? No
8. Were you married and living with wife (or husband) on the last day of your taxable period? Yes
9. If not, were you on the last day of your taxable period supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption?
10. How many dependent persons under 18 (or if 18 or over, incapable of self support because mentally or physically defective) were receiving their chief support from you on the last day of your taxable period? 3
11. Was a separate return filed by your wife (or husband)? yes If so, state (a) exemption claimed $1000.00 (b) Name and address entered at head of that return Florence Tucker, Pawhuska Oklahoma
12. Write "R" if you kept no books, or books on a cash basis; or "A" if you kept books on an accrual basis R
13. Did you pay during the calendar year 1920 to any individual rent, wages, salaries, or other fixed or determinable income amounting to $1,000 or over? No (If so, secure from the Collector Forms 1096 and 1099 and file a return of information.)
14. Enter below all nontaxable income received by you during the taxable period from the following sources:

Class of Securities.	Principal.	Interest.	Class of Securities.	Principal.	Interest.	Source of Compensation.	Amount.
First Liberty Loan 3½% Bonds unconverted	$	$	Obligations of States and Territories, political subdivisions thereof, and the District of Columbia	$	$		$
Other obligations of the U. S. issued before Sept. 1, 1917, and obligations of U. S. possessions							
Victory Liberty Loan 3¾% Notes			Federal Farm Loan Bonds				

15. Enter in the table below income (whether received or not) from partnerships, personal service corporations, and fiduciaries.

1. Name and Address of Partnership, Personal Service Corporation, or Title of Estate or Trust, with Name and Address of Fiduciary.	2. Period (Enter 1920 or Date on which Fiscal Year Ended).	3. Interest on Tax-Free Covenant Bonds.	4. Dividends.	5. Interest on Liberty Bonds, etc., Issued Since Sept. 1, 1917, and War Finance Corporation Bonds.	6. Other Income.
W.C.Tucker, Pawhuska, Okla. GDn of Mohogle and Metsahike	1920	$	$	$	$ 800.00
Gdn of Rose Strike Axe	1920				600.00
Osage Mercantile Company	1920		24,608.86		
		Enter on F (b), page 2.	Enter on H (b), page 2. 24,608.86	Include in 16 (a), page 1.	Enter on C, page 2. 1400.00

OR OF INTERNAL REVENUE FOR YOUR DISTRICT.

(a) Totals (see page 2 of instructions, Schedule C) .....

16. Enter on line (a) in the table below **Interest on Liberty Bonds** and other obligations of the United States issued since September 1, 1917, and War Finance Corporation Bonds, received by you during the taxable period, including interest received through partnerships, personal service corporations, and fiduciaries. (See page 2 of instructions, Schedule I.)

Obligations	First Liberty Loan Converted 4% Bonds of 1932-47.	Second Liberty Loan 4% Bonds of 1927-42.	First Liberty Loan Converted 4½% Bonds of 1932-47.	Second Liberty Loan Converted 4½% Bonds of 1927-42.	Third Liberty Loan 4½% Bonds of 1928.	First Liberty Loan Second Converted 4½% Bonds of 1932-47.	Fourth Liberty Loan 4½% Bonds of 1933-38.	——% Other Obligations Issued Since Sept. 1, 1917.	Victory Liberty Loan 4½% Notes of 1922-23.	War Finance Corporation 5% Bonds of 1920.
Interest Dates	June 15. December 15.	May 15. November 15.	June 15. December 15.	May 15. November 15.	March 15. September 15.	June 15. December 15.	April 15. October 15.		June 15. December 15.	April 1. October 1.
(a) Amount of interest	$	$	$	$	$	$	$	$	$	$
(b) Average principal										
Exemptions.										
(c) $5,000									xxxxxx	xxxxxx
(d) 20,000								xxxxxx	xxxxxx	xxxxxx
(e) 30,000								xxxxxx	xxxxxx	xxxxxx
(f) 45,000						xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx
(g) 30,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx		xxxxxx	xxxxxx	xxxxxx	xxxxxx
(h) 30,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx		xxxxxx	xxxxxx	xxxxxx
(i) 5,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	
(j) Principal in excess of exemptions										
(k) Taxable interest										

(l) Total taxable interest on all obligations as computed above on line (k) (enter as Item 19 below, and as Schedule I, page 2) ..... $

State the amount of the Victory Liberty Loan 3½% and 4½% Notes originally subscribed for and still owned at the date of filing this return ..... $

State the amount of the Fourth Liberty Loan 4½% Bonds originally subscribed for and still owned at the date of filing this return ..... $

COMPUTATION OF TAX.

17. Net income on which tax is to be computed (from Schedule N)		$ 46,467	74
18. Less: Dividends (from Schedule H)	$ 37,117 47		
19. Taxable interest on Liberty Bonds, etc. (from Item 16 (l) above)			
20. Personal exemption	1,600 00		
21. Total of Items 18, 19, and 20		38,717 47	
22. Balance subject to normal tax (Item 17 minus Item 21)		$ 7,750	27
23. Amount subject to normal tax at 4% (not over $4,000)		4,000	00
24. Balance subject to normal tax at 8% (Item 22 minus Item 23)		$ 3,750	00

25. Normal tax at 4% on amount of Item 23	$ 160	00
26. Normal tax at 8% on amount of Item 24	300	02
27. Surtax on Item 17 (see surtax table, page 1 of instructions)	4712	90
28. Total Tax	$	
29. Less: Tax paid at source $		
30. Income and profits taxes paid during taxable period to foreign countries or possessions of the United States (attach Form 1116)	$	
31. Balance of tax due (Item 28 minus Items 29 and 30)	5,172	92
32. Amount of tax paid on submission of return	$ 1,293	23

PREPARATION OF RETURN.

Did you employ anyone especially to prepare or advise in the preparation of this return? (Answer "Yes" or "No.") No If so, give name and address and state the extent to which you received such assistance or advice.....

AMENDED RETURNS.

An amended return must be plainly marked "Amended" across the face of the return.

CHECKS AND DRAFTS.

Checks and drafts will be accepted only if payable at par at your Collector's office.

62—10487

DETACH RETURN HERE AND SEND IT TO COLLECT

47-48

INDIVIDUAL RETURN OF TAXABLE INCOME

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION.

1. Kind of business ..... 2. Business address .....

3. Total sales and income from business or professional services ..... $

COST OF GOODS SOLD:

4. Labor ..... $
5. Material and supplies .....
6. Merchandise bought for sale .....
7. Other costs (list principal items and amounts at foot of page or on separate sheet) .....
8. Plus inventory at beginning of year (see page 2 of instructions, Schedule A) .....
9. TOTAL ..... $
10. Less inventory at end of year .....
11. NET COST OF GOODS SOLD ..... $

State amount of salary to self included in Item 12 ..... $
State amount of obsolescence included in Item 16 ..... $

OTHER BUSINESS DEDUCTIONS:

12. Salaries and wages not reported as "Labor" under "Cost of goods sold" ..... $
13. Rent on business property in which taxpayer has no equity .....
14. Interest on business indebtedness to others .....
15. Taxes on business and business property .....
16. Repairs, wear and tear, obsolescence, depletion, and property losses (explain in table below) .....
17. Amortization of war facilities .....
18. Bad debts arising from sales or professional services .....
19. Other expenses (list principal items and amounts at foot of page or on separate sheet) .....
20. TOTAL (Items 12 to 19, inclusive) ..... $
21. NET COST, PLUS TOTAL DEDUCTIONS (Item 11 plus Item 20) ..... $
22. NET INCOME FROM BUSINESS OR PROFESSION (Item 3 minus Item 21) ..... $

SCHEDULE B.—INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTOR'S FEES, AND PENSIONS.

1. By Whom Received. (Give name.)	2. Occupation.	3. Name and Address of Employer.	4. Amount Received.	5. Expenses (Explain Below).	
W. C. Tucker	Pres & Mgr	Osage Merc Co- Pawhuska Ok	$9600 00	$ -	
"	Pres	Mercantile Real Estate Co. "	300 00		
"	Director	Citizens Nat'l Bank " "	2500 00		
NET INCOME FROM SALARIES, ETC. (total of column 4 minus total of column 5)			$9925 00	$	$ 9925 00

SCHEDULE C.—INCOME FROM PARTNERSHIPS, PERSONAL SERVICE CORPORATIONS, AND FIDUCIARIES (From Item 15 (a) column 6, page 1) ..... $ 1400 00

SCHEDULE D.—PROFIT FROM SALE OF LAND, BUILDINGS, STOCKS, BONDS AND OTHER PROPERTY, AND FROM LIQUIDATING DIVIDENDS.

1. Kind of Property.	2. Name and Address of Purchaser or Broker.	3. Sale Price or Liquidating Dividends.	4. Date Acquired	5. Cost, or if Acquired Prior to March 1, 1913, the Fair Market Value on That Date.	6. Cost of Subsequent Improvements, if any.	7. Depreciation.	
		$		$	$	$	
NET PROFIT FROM SALES (total of columns 3 and 7 minus total of columns 5 and 6)		$		$	$	$	$

SCHEDULE E.—INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property.	2. Name and Address of Tenant, Lessee, etc.	3. Amount Received.	4. Repairs, Wear and Tear, Obsolescence, Depletion and Property Losses	5. Interest.	6. Taxes.	7. Other Expenses (Explain Below).

NET INCOME FROM RENTS AND ROYALTIES (total of column 3 minus total of columns 4, 5, 6, and 7)																			

SCHEDULE F.—INTEREST ON CORPORATION BONDS CONTAINING TAX-FREE COVENANT, ON WHICH A TAX OF 2% WAS PAID AT SOURCE.
Received (*a*) directly, $_____; (*b*) through partnerships, personal service corporations, and fiduciaries (Item 15 (*a*), column 3), $_____ TOTAL $_____

SCHEDULE G.—OTHER INCOME (not including dividends, or interest on obligations of the United States).

	AMOUNT RECEIVED	
1. Interest on bonds, mortgages, and other obligations of domestic and resident corporations except as reported in Schedule F		
2. Interest on bonds of foreign countries and corporations, and dividends on stock of foreign corporations which are not taxable by the United States on their net incomes		
3. Interest on bank deposits, mortgages, etc		
4. Amount paid for you at source on tax-free covenant bonds		
5.		
TOTAL		

SCHEDULE H.—DIVIDENDS.
Received (*a*) directly, $12508.61; (*b*) through partnerships, personal service corporations, and fiduciaries (Item 15 (*a*), column 4), $24608.86 TOTAL $37117 47

SCHEDULE I.—TAXABLE INTEREST ON LIBERTY BONDS, OTHER OBLIGATIONS OF THE UNITED STATES, AND WAR FINANCE CORPORATION BONDS (from Item 16 (*l*), page 1) $_____

SCHEDULE J.—TOTAL NET INCOME FROM ABOVE SOURCES (Total net income less total deficits shown in above Schedules) $48442 47

SCHEDULE K.—DEDUCTIONS (except those included above and contributions).

1. Interest paid	$ 614 73	3. Losses by fire, storm, etc. (explain in table below)	$
2. Taxes paid		4. Bad debts (explain in space at foot of page)	1325 00
		5. Amounts paid to beneficiaries, etc	$
		TOTAL	$ 1939 73

SCHEDULE L.—NET INCOME (without deducting contributions) (J minus K) $46502 74

SCHEDULE M.—CONTRIBUTIONS (List below names and amounts paid to each corporation) $ 35 00

SCHEDULE N.—NET INCOME UPON WHICH TAX IS TO BE COMPUTED (L minus M) (Enter as Item 17, page 1) $46467 74

ENTER IN THIS TABLE DETAILS CONCERNING REPAIRS, WEAR AND TEAR, PROPERTY LOSSES, ETC., CLAIMED AS DEDUCTIONS IN SCHEDULES A, E, AND K ABOVE.

1. Refer to "A," "E," or "K."	2. Kind of Property (If Buildings, State also Material of Which Constructed).	3. Date Acquired.	4. Age When Acquired.	5. Cost, or if Acquired Prior to March 1, 1913, the Fair Market Value on That Date.	6. Repairs, Ordinary and Incidental.	Wear and Tear, Obsolescence, and Depletion Charged Off. 7. Rate.	8. Amount previous years.	9. Amount this year.	10. Losses not Compensated for by Insurance or Otherwise. Cause and How Amount Was Arrived at.
				$	$		$	$	

EXPLANATION OF DEDUCTIONS claimed in Schedule A, Items 7 and 19; Schedule B, column 5; Schedule E, column 7; Schedule K, Item 4; and Schedule M. (Attach separate sheet if necessary.)

K 4—Stock in Nenzel Crown Point Mining Co. Charged off as worthless $1325.00

M. - Red Cross $5.00 Jewis Relief 10.00 Police Relief 20.00

49-50

Q. Referring again to Schedule (B) it is shown that the agent has figured profit on shares $19,230.84?

A. Yes, sir.

Q. That is what the report shows?

A. Yes, sir.

Q. It is on the basis of that additional profit shown by this agent's report, in part at least, that the additional tax was assessed?

A. Yes, sir.

Q. I hand you this paper which has been marked Plaintiff's Exhibit One and ask you to state what that is.

A. It is a photostatic copy of my individual income tax return for the year 1920.

Q. Who did you obtain it from?

A. It was sent to me from the office of the Internal Revenue Commissioner.

[fols. 45 & 46] Q. Mr. Tucker, instead of the photostatic copy about which I ask you, I have been given a certified copy by counsel on the other side which I have had marked Plaintiff's Exhibit 1, in place of the other copy, and we offer this certified copy in evidence.

Mr. Toomey: No objection.

A. That is my signature on there.

(Here follows Exhibit 1, marked side folio pages 47, 48, 49, and 50)

[fol. 51] (Thereupon Plaintiff's Exhibit 1 was received in evidence, and is an income tax return on blank for net incomes of more than $5,000 for the calendar year 1920, showing total net income on which tax is to be computed of $46,467.74, and total tax of $5,172.92.)

By Mr. Garnett:

Q. Now this return, Exhibit 1, shows your net income of $46,467.34. Did that cover all your income except the profit on your stock in the Osage Mercantile Company at liquidation which is the matter in dispute in this suit?

A. I consider that covered all my income for that year.

Q. You didn't in this include any profit on your shares on liquidation of the Osage?

A. No, sir.

Q. But you put everything else in it?

A. Yes, sir.

Q. What was the amount of tax shown and paid on this return?

A. $5,172.92.

Q. In this return Mr. Tucker, you have shown the sum of $24,608.86 as dividends in one place and in another as distribution of partnership. Was that, in fact, earnings of the partnership of you and your brother for a period after the Osage Mercantile Company liquidated?

A. It was.

Q. Considering it as dividends as you did in computing the tax, the result was that you didn't compute a large enough tax.

A. I- was, yes, sir.

Q. Do you know how much additional tax would result from your failure to compute it?

A. I was informed yesterday it was eight per cent.

Q. That item not being a dividend but proceeds from a partnership would be subject to an eight per cent normal tax under the law?

A. So I understand.

Q. The eight per cent normal tax on that increases your tax liability by how much?

A. $1,900 and something.

Q. $1,968.71.

A. $1,968.71.

Q. Then the amount paid on your return of $5,172.92, and this additional sum of $1,968.71 resulting from the normal tax of eight per cent on your partnership earnings gives you a total tax liability on the basis of your return of $7,141.63. Is that the correct computation?

A. I think that would be correct, yes, sir.

Q. Did you afterwards pay additional tax?

A. Yes, sir. May I see that Dye report? Did he consider it as a dividend?

Q. No, he transferred it from dividends to partnership earnings.

A. He evidently computed it correctly then.

[fol. 52] Q. Yes, In Mr. Dye's report he made the correction of that error. Now how much additional tax was assessed Mr. Tucker?

A. 8,610.84.

Q. What year was that for?

A. Additional for the year 1920.

Q. I hand you this paper which has been marked Plaintiff's Exhibit No. 2, and ask you to state if that is a notice and demand for tax you received from the Collector of Internal Revenue at Oklahoma City, Oklahoma?

A. It is.

Q. That is known as a ten day notice and demand isn't it?

A. I think so.

Q. Dated October 4th, 1923. We offer this in evidence.

Mr. Toomey: No objection.

(Thereupon plaintiff's Exhibit No. 2 was received in evidence, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 2

"Income, War-Profits, and Excess Profits Tax

Form 7658

Notice and demand for Tax

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of five per cent of the amount of tax due will be added, plus interest at the rate of one per cent per month, from Oct. 15, 1923, until paid.

Dated Oct. 4, 1923.

Name and address: W. C. Tucker, Pawhuska, Okla.

Sept. 97.

Items: Add'l 1920 tax disclosed by audit in Washington. Total Assessment: $8,610.84."

Q. Did you afterward pay the sum of $8,610.84 additional tax?

A. Yes, sir.

Q. Did you obtain a receipt for it?

A. I did.

Q. I hand you this paper which has been marked Plaintiff's Exhibit No. 3, and ask you if that is the Collector's receipt for that tax?

A. Yes, sir.

Q. Was that paid under protest?

A. Yes, sir.

[fol. 53] Q. And in response to the notice and demand, Exh-bit 2?

A. Yes, sir. October 30, 1923.

Q. Under the terms of that notice and demand you are subject to penalty and interest on failure to pay?

A. Yes, sir.

Q. And to avoid that you paid this tax under protest and took the receipt?

A. Yes, sir.

Q. The receipt bears the endorsement, "Paid under protest?"

A. Yes, sir.

Q. We offer in evidence, Plaintiff's Exhibit No. 3.

(The instrument was thereupon received in evidence, being Plaintiff's Exhibit No. 3, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 3

"Taxpayer's Receipt for Income and Excess Profits Tax

Office Collector Internal Revenue

Paid under protest.

Form No. of return. Sept. 97-Commr's. 23—A. Add'l 1920.

Tax, $8,610. Cts. 84.

Name: W. C. Tucker.

Address: Pawhuska, Okla.

Received payment 10/30/23.

Acel C. Alexander, by M. Hawes, cashier.

Q. Now Mr. Tucker, did you file a claim of abatement and refund of tax before this sum was paid?

A. Yes, sir.

Q. Were you required to pay the tax before that claim was passed upon?

A. Yes, sir.

Q. Then did you later file a claim for refund of tax?

A. Yes, sir.

Q. I hand you this paper marked Plaintiff's Exhibit 4, and ask you if that is a carbon duplicate except as to the printed form of the claim for refund you filed?

A. Yes, sir.

Q. Was that filed immediately after the tax was paid?

A. I think it was, yes, sir.

Q. Can you say whether it was filed on or about the second day of November?

[fol. 54] A. It was filed early in November I am satisfied.

Q. What date is it verified?

A. First day of November 1923.

Q. Filed immediately after that date?

A. Yes, sir.

Q. We offer in evidence Plaintiff's Exhibit No. 4, being the claim for refund to which the witness has testified:

(Thereupon the instrument, Plaintiff's Exhibit No. 4, was received in evidence and is as follows:)

PLAINTIFF'S EXHIBIT No. 4

Notice to Collector

STATE OF OKLAHOMA,
County of Osage, ss:

W. C. Tucker, Pawhuska, Oklahoma

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

1. Business in which engaged: General Merchandise.
Period: From Jan. 1, 1920, to Dec. 31, 1920.

2. Character of assessment or tax: Income tax.

3. Amount of assessment or stamps purchased: $13,783.76.

4. Reduction of tax liability requested (Income and profits tax): $9,301.23.

5. Amount to be abated: None.

6. Amount to be refunded (or such greater amount as is legally refundable): $9,301.23.

7. Dates of payment: $5,172.92 installments in 1921. $8,610.84 paid 10-30-23.

8. District in which return was filed: Oklahoma.

9. District in which unpaid assessment appears: No unpaid assessment.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from —— ——: None.

Deponent verily believes that this application should be allowed for the following reasons:

[fol. 55] That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT:PA:Fr-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the asses'ment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore,

entitled to interest on the tax refunded from the date of payment.

(Signed) W. C. Tucker.

Sworn to and subscribed before me this 1st day of November, 1923. Lois Haynie, Notary Public. (Seal.)

Q. Now did you ever get a communication from the Commissioner of Internal Revenue in reference to your claim about which you just testified?

A. Yes, sir.

Q. I hand you this paper which is marked Plaintiff's Exhibit 5, and ask you when you received it, how and who from?

A. I received it probably late in April 1925. It is dated April 24th, 1925 from the treasury department; the Commissioner of Internal Revenue.

Q. And how is it signed?

A. Signed J. E. Bright, deputy commissioner by A. Lewis, head of division.

Q. We offer in evidence Plaintiff's Exhibit No. 5.

Mr. Toomey: This raises a small point. It might entail the question of costs in this case. Under date of April 24th, 1925 the department has allowed them to reconsider this question, reconsider their claim for abatement and claim for refund, and they are allowing him a refund of $216.00. [fol. 56] I don't know whether it is any part of this case or not. That refund claimed, $216.00, will come through in the regular course and the plaintiff will receive it the same as though this suit had never been filed. I don't think it ought to have any part in this case to carry costs with it. That would be the only effect. There is no other objection.

Mr. Garnett: This suit was filed I think last fall, the petition will show, or early in the winter, and included in the recovery sought in that petition is this particular item. Now after suit is filed and pending, and after the issues are joined the Commissioner transmits a letter saying there is a balance due us of $216.26, admitting that much liability of the amount we sued for.

The Court: That was before this suit was brought?

Mr. Garnett: No, sir. This letter is dated April 23, 1925.

Mr. Toomey: This specifically refers to your claim for abatement and claim for refund which was filed along last November. Was it November 1924?

Mr. Garnett: 1923.

Mr. Toomey: Any way, that is his claim for refund which the taxpayer filed at Washington a long time prior to the commencement of this suit. I don't think the department ought to be penalized for costs on this. It is a small matter. There is no judgment necessary for them to get this money. This is scheduled through the Collector's office at Oklahoma City, and they will get the money just the same.

The Court: However, that might be I think it is proper to receive it in evidence.

(Thereupon, Plaintiff's Exhibit 5 was received in evidence, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 5

Treasury Department, Washington

April 24, 1925.

IT: PA: 2. RO'L-203.

Mr. W. C. Tucker, Pawhuska, Oklahoma.

SIR: Your claim for the abatement of $8,610.84 and refund of $690.39, aggregating $9,301.23, and your claim for [fol. 57] refund of $9,301.23, income and surtaxes for the year 1920, have been examined.

The claims are based on the following statement:

"The proposed assessment of additional tax is based upon a Revenue Agent's report under date of June 5, 1922, and transmitted under date of June 17, 1922. In that report the Revenue Agent has charged the taxpayer with the profit derived from the liquidation of the Osage Mercantile Company in 1920 in the sum of $19,230.84. This amount is set up as additional income and the larger part of the proposed additional tax rests upon this item.

"The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis

for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

A reexamination of your return and the Revenue Agent's report for 1920 in connection with your protests and other data submitted, results in your tax liability being reduced from $13,783.76 to $13,567.50, the details of which are shown in a separate communication.

Your claim for refund of $9,301.23 will be allowed for the amount of the overassessment as above indicated in the amount of $216.26 and rejected for the balance of $9,084.87. The combined claim for abatement of $8,610.24 and refund of $690.79, aggregating $9,301.23, will be rejected. The abatement portion, however, will not have to be paid, because, owing to Section 250 (d) having been complied with, the abatement portion of the claim was not accepted, that is, abatement of the assessment was not allowed.

Respectfully, J. G. Bright, Deputy Commissioner,
by A. Lewis, Head of Division.

[fol. 58] By Mr. Garnett:

Q. Have you ever received a refund of the $216.26 referred to in the letter, Exhibit 5?

A. No, sir, I have not.

Q. Have you ever received any refund of any part of this additional tax you paid in October 1923?

A. No.

Q. Have you ever received any notice of rejection of your claim or action on your claim for refund prior to this letter of April 24, 1925?

A. I think not. Not that I remember at this time.

Q. Mr. Tucker, your payment of taxes of $5,172.92 on your return and the payment of this additional assessment of $8,610.84 makes your total tax payments for the year 1920, $13,783.76. Is that correct?

A. Yes, sir.

Q. Now your true tax liability as shown on your return after correction of the error in handling the earnings from the partnership shows $7,141.63?

A. I think that is correct, yes, sir.

Q. Deducting that from your total tax payment leaves $6,642.13?

A. Yes, sir.

Q. This latter sum I have just quoted then is the balance which you now claim a refund on?

A. It won't be that much if I am going to get this other check.

Q. Well, but you haven't gotten the check.

A. I haven't gotten the check.

Q. That is the amount you claim you are entitled to recover of the tax you have paid?

A. Yes, sir.

Q. The amount you are suing for in this action—you sued for more than that—that is the amount you now say you are entitled to in this action?

A. Yes, sir.

Q. In your cross-examination counsel asked you whether notice of any sort was given when you changed from a corporation to a partnership. You testified as to publishing notice of the dissolution of the corporation and formation of the partnership. Did you make any other advertisements of the fact that you were changing?

A. We did. We made a display advertisement.

Q. What was the nature of that?

A. Announcing the dissolution of the corporation and continuation under the name of Osage Mercantile Company, a partnership.

Q. Partnership composed of whom?

A. R. W. Tucker and myself.

Q. How extensively did you advertise?

A. That was in the daily paper up there at that time.

[fol. 59] Q. Just had one daily?

A. Just had one paper and in one weekly.

Q. About how long did you carry that?

A. I think it probably was one publication in each paper, the display advertisement. The legal notice was carried there quite awhile.

Q. Was that published in the same paper if you know?

A. I think it was published in the daily. I know I had numerous inquiries as to what was the matter.

Q. Do you have here a certified copy of the court's decree dissolving that corporation in July 1920?

A. Yes, sir.

Q. And you have the original articles of co-partnership between yourself and R. W. Tuckeer, forming a partnership under the name of the Osage Mercantile Company?

A. Yes, sir.

Q. They show that the dissolution of the corporation and organization of the partnership took place in the month of July 1920?

A. Yes, sir.

Q. Now yesterday you testified as to the amount of tax liability of the Osage Mercantile Company outstanding at liquidation which was afterward paid by the stockholders who received the assets in liquidation. Have you got those figures in the form of a statement?

A. Yes, sir.

Q. I hand you this paper marked Plaintiff's Exhibit 6, and ask you if that sets forth the items of payment making up those taxes with the dates of payment of the Federal income taxes?

A. Yes, sir.

Q. We offer in evidence Exhibit 6. That is the table of the taxes about which he testified orally.

(Thereupon the instrument referred to, Plaintiff's Exhibit No. 6, was received in evidence, and is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 6

Tax liability of Osage Mercantile Company outstanding at liquidation and assumed by W. C. and R. W. Tucker July 22nd, 1920, as evidenced by payments made as outlined below.

Federal Income Tax Paid

Sept. 13, 1920	$3,663 43	on 1919 tax.
Dec. 10, 1920	3,663 43	on 1919 "
March 14, 1921	2,680 09	on 1920 "

[fol. 60] June 15, 1921	2,680.08	on 1920	"
June 15, 1921	14,093.35	on 1918	"
Sept. 14, 1921	2,680.08	on 1920	"
Dec. 13, 1921	2,680.08	on 1920	"
Jan. 25, 1923	4,327.86	on 1917	"
Total	36,468.40		
Less refund Nov. 15, 1924:			
Treasury check No. 470980	1,543.20		
		$34,925.20	
Capital stock tax for 1920		166.00	
Advalorem taxes for 1920		2,474.69	
Total		$37,565.89	

Recross-examination.

By Mr. Toomey:

Q. You owned half interest in this partnership after the dissolution?

A. Yes, sir.

Q. Did you sustain any loss of earning power by reason of the change?

A. I think not.

Q. Your income tax return, your personal return marked Plaintiff's Exhibit No. 1 here shows that you received as your distributive share from the Osage Mercantile Company, a partnership in 1920, the sum of $24,608.86. This is correct isn't it?

A. Yes, sir.

Q. That represented your half interest?

A. Yes, sir.

Q. The earnings of that partnership then for the last five months of 1920 were over $49,000?

A. Five and one-third months.

Q. As a matter of fact, Mr. Tucker, those were the highest earnings that the mercantile company ever sustained for any previous five months of its existence wasn't it?

A. Yes, sir.

Q. This is the minute book of the corporation is it not? (Handing witness book.)

A. Yes, sir.

Q. And what is this book here.

A. That is the book known as our general ledger No. 4.

Q. It is part of the records of the company?

A. Part of the records of the Osage Mercantile Company, a corporation.

Q. The dividends declared by the corporation in the regular way are set forth in the minute book are they not?

[fol. 61] A. I think they are all in there. They should be.

Q. It was the policy of the company to declare dividends at the regular meetings of the directors?

A. It was the policy of the company when a dividend was anticipated to call a meeting and authorize it.

Q. Going back to this real estate transaction in May 1913, what did you personally receive out of that transaction?

A. I received my stock in the Mercantile Real Estate Company.

Redirect examination.

By Mr. Garnett:

Q. Mr. Tucker, since your testimony yesterday have you refreshed your recollection as to just how the transfer of the real estate from the Osage Mercantile Company to the Mercantile Real Estate Company was handled?

A. I have in conversation with my brother in line with his testimony yesterday.

Q. How was that done?

A. It was done by the stockholders of the Osage Mercantile Company, the corporation, giving their individual checks to the Mercantile Real Estate Company, and those checks were turned over to the Osage Mercantile Company, the corporation, in payment for the real estate, and then after that the Osage Mercantile company, the corporation, paid out a cash dividend of $18,000 with those checks, and $3,000 additional.

Q. What was the amount of those checks given to the Mercantile Real Estate Company for its stock?

A. The gross amount was $15,000.

Q. Then what distribution, or what amount did the Osage Mercantile Company distribute in dividends?

A. Distributed $18,000.

Q. Where is that dividend record? Is it this book?

A. Under undivided profits.

Q. And this book, general ledger No. 4 about which counsel just asked you, at page 285 shows your undivided profit account?

A. Yes, sir.

Q. And it shows a dividend of $18,000 on May 8th, 1913?

A. Yes, sir.

Q. And that is the dividend about which you have just testified as being made up of $15,000 from the checks, or representing on the books of the corporation the checks received from the Mercantile Real Estate Company for the real estate?

A. Yes, sir.

Q. And $3,000 additional?

A. Yes, sir.

[fol. 62] Q. And on May 13th, $25,150 is shown there marked real estate. What was that?

A. That was the balance in the real estate account that was charged to undivided profits to get it off the books.

Q. The real estate account was $40,150?

A. Yes, sir, the real estate account, the balance was $40,150.

Q. All these dividends are indicated in this record as cash are they not?

A. Yes, sir.

Q. And this of May 13th is marked real estate?

A. Yes, sir.

Q. This minute book to which counsel referred at page 99 purports to contain the minutes of a meeting of May 6th, 1913 covering pages 99, 100 and 103. Now are those three pages to which I have referred the minutes of the meeting of May 6th?

A. Yes, sir, 1913.

Q. Of the records of the Osage Mercantile Company?

A. Yes, sir.

Q. Was action taken there relative to disposing of the real-estate?

A. It was.

Q. Was that the basis for the disposal of it?

A. Yes, sir.

Q. We offer this minute in evidence.

By Mr. Toomey:

Q. What became of that other page?

A. I don't know. It is the first time I knew there wasn't one there.

Q. You can mark that Plaintiff's Exhibit No. 7.

Mr. Garnett: The minutes referred to are marked Plaintiff's Exhibit No. 7 for identification.

Thereupon, the minutes referred to, marked Plaintiff's Exhibit No. 7, were received in evidence, and are as follows:

PLAINTIFF'S EXHIBIT NO. 7

"Pawhuska, Okla., May 6, 1913—
4:00 o'clock p. m.

"At the regular meeting of the Board of Directors the following named were present: W. C. Tucker, G. W. Hutchins, J. W. Ferguson, W. T. Mosier, W. S. Mathews and R. W. Tucker, being all the directors and stockholders of the company.

The Board was called to order by W. C. Tucker, president. W. T. Mosier presented the following resolution and moved its adoption:

[fol. 63] "Resolved that W. C. Tucker, president of the Osage Mercantile Company is hereby authorized and empowered and directed to sell all the real estate owned by this corporation, Osage Mercantile Company, to-wit: Lots, 17, 18, 19, 33, 34, 35 and the south fifteen feet of lot 36 in block 84, the east one-half of lot 11 and all of lot 12 in block 67; lots 9, 10 and 16 feet west side of lot 11 in block 8, and lots one and two in block 40 all in Pawhuska, Oklahoma as shown by the official plat thereof to the Mercantile Real Estate Company, a corporation located at Pawhuska, Oklahoma, for a consideration of $25,000 to be paid as follows: $15,000 in cash, and for the remaining $10,000 the said Mercantile Real Estate Company assumes and agrees to pay the $10,000 mortgage due J. W. Perry on said real estate. The said Mercantile Company agrees to assume the paving taxes and W. C. Tucker as president of the Osage Mercantile Company is hereby authorized, empow-

ered and directed to deliver a warranty deed subject to the foregoing named incumbrances from the Osage Mercantile Company to the said Mercantile Real Estate Company for all the above named real-estate. Motion to adopt the foregoing resolution was seconded by J. M. Ferguson and upon a show of hands all members present as above set forth voted in the affirmative, and the resolution was declared adopted.

J. M. Ferguson then presented the following resolution, and moved its adoption:

"Resolved that $10,000 be credited to the real estate account and charged to the bills payable account, the same being the amount of real estate mortgage due J. W. Perry and assumed by the Mercantile Real Estate Company. The motion to adopt the foregoing resolution was seconded by R. W. Tucker, and upon a show of hands all members present as above set forth voted in the affirmative and the resolution was declared adopted. W. T. Mosier then presented the following resolution and moved its adoption: "Resolved that a dividend of 60 per cent on the capital stock be declared payable May 7th, 1913, and that the secretary and treasurer be instructed to pay the same. The motion to adopt the foregoing resolution was seconded by G. W. Hutchins, and upon a show of hands all parties present voted in the affirmative and the resolution was declared adopted. Whereupon, the meeting adjourned.

(Signed) R. W. Tucker, Secretary and Treasurer. W. C. Tucker, President. W. S. Mathews, J. M. Ferguson."

[fol. 64] By Mr. Garnett:

Q. Mr. Tucker, was the $18,000 dividend about which you have testified as dated on May 8th, and appearing on page 285 of Ledger four the 60 per cent dividend authorized by this resolution?

A. It was.

Q. Were you president of the company at that time?

A. Yes, sir.

Q. And who was secretary and treasurer?

A. My brother, R. W. Tucker.

Q. He had both of those offices?

A. Yes, sir.

Q. Now was the transfer of the real estate carried out in accordance with those minutes?

A. It was.

Q. The $10,000 indebtedness was assumed by the Mercantile Real Estate Company?

A. Yes, sir.

Q. And the Mercantile Real Estate Company paid in $15,000?

A. Yes, sir.

Q. You credited real estate and charged bills payable did you or the other way?

A. Yes, sir; charged bills payable and credited real estate.

Q. The only consideration received for that real estate was the $25,000 paid as indicated in that resolution, $15,000 by check and assuming an indebtedness of $10,000. That is the only consideration paid the Osage Mercantile Company for the real estate. Is that right?

A. To the Osage Mercantile company as a corporation, yes.

Q. The stockholders understood they were getting their pro-rata share out of the other?

A. For the stock.

Q. They held stock in the real estate company in the same proportion?

A. Yes, sir.

Q. But as between the two corporations the consideration, and only consideration passing from the Mercantile Real Estate Company and received by the Osage Mercantile Company was the $15,000 paid by check and assuming a debt of $10,000?

A. Yes, sir.

Q. The remaining value of $25,150 in the real estate account you just charged off to balance the account?

A. Yes, sir, charged it to undivided profits.

Recross-examination.

By Mr. Toomey:

Q. This $18,000 dividend declared there was composed of $15,000 received from the Mercantile Real Estate Company and $3,000 of other funds?

A. Yes, sir.

Q. That $15,000 did you get back in the form of money, or did you get those same checks back endorsed by the corporation?

[fol. 65] A. Well, I can't say. I will have to say what somebody else told me. My brother told me last night how the deal was.

Q. You have no independent recollection?

A. I don't remember.

Witness excused.

Mr. Garnett: Plaintiff rests.

COLLOQUY BETWEEN COUNSEL

Mr. Toomey: I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913 including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was $356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing that March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced $153.15, leaving a net March first value per share of $203.71. I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share. That if the court should hold that the Government is wrong in its method of computing the March first, 1913 value, hold we are wrong entirely, that the plaintiff is entitled to judgment for $6,642.13, the maximum amount of the recovery will be only $6,642.13. The correct means of treating the $216.26 will be reserved for the determination of the court.

Mr. Garnett: It is understood that if the Government is wrong as counsel as stated as to the handling of the dividends the amount refunded of taxes will be $6,642.13.

Mr. Toomey: Yes, sir.

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the tax-payer is entitled to will not be included in the judgment, then that would be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on good will value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation.

[fol. 66] S. O. Dye was thereupon called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. What is your name?
A. S. O. Dye.
Q. Were you ever connected with the revenue service?
A. Yes, sir.
Q. Where?
A. In Oklahoma, Arkansas and Washington.
Q. During your employment as a revenue inspector with the Treasury Department, did you have occasion to investigate the books of the Osage Mercantile Company?
A. Yes, sir.
Q. Did you have occasion to make investigation of the personal tax liability of W. C. Tucker, one of the stockholders of that corporation?
A. Yes, sir.
Q. In making a report upon the individual liability of W. C. Tucker, did you have occasion to go into the question of computing the taxpayer's income from the liquidation of the Osage Mercantile Company, a corporation?
A. I did.

Q. And in so doing you had occasion to consider the proper method of arriving at the March first value of Mr. Tucker's interest in the corporation did you not?

A. Yes, sir.

Q. Will you state to the Court just how you arrived at the March first value of that stock?

A. May I have the report?

Q. The notes which you are using now are your own notes in your own handwriting, which you had at the time are they not?

A. Yes, sir. On making this determination of the investment on March first 1913, I started with the investment per books shown in the ledgers and then this amount was adjusted for surplus earned prior to March first 1913 which had been distributed in the form of dividends or turned over to the Mercantile Real Estate Company in May of that year. This was done on the theory that the Mercantile Real Estate Company was a——

Mr. Garnett: I object to him stating his theory or reasons for his method. He can tell the fact of the method he used, but I don't feel he can testify as to what method should have been used, because that is the real question in the case.

By The Court: Overruled.

Mr. Garnett: Exception.

Mr. Toomey: Go ahead.

[fol. 67] A. This procedure was followed because in determining the value of the assets distributed in 1920 it seemed necessary to segregate from the March first, 1913 value of the stock of the Osage Mercantile Company those values which had been transferred into another organization, and the stock of which was still held by the stockholders at the time the mercantile company or the Osage Mercantile Company was liquidated. After this division it had no less than it had before——

Mr. Garnett: I object to that. That is purely a matter of argument.

The Court: Let's hear fully how this came about. It won't be binding on the court unless it is sound, but let the witness explain fully.

Mr. Garnett: Exception.

Q. Explain to the court how you did this thing.

A. It was done in that way because after the division the stockholders had the same assets that they had before except that it was represented by shares of the two corporations instead of one.

Q. In making the examination you had occasion to go over the books of the corporation did you not?

A. Yes, sir.

Q. And have you since refreshed your memory by making a further examination?

A. I saw the books this morning.

Q. Handing you what the plaintiff in this case has already identified as the general ledger of the corporation, I will ask you to state how the transfer of that real estate was carried on the books of the corporation?

A. According to these books the real estate was carried at fifty thousand and one hundred and fifty dollars, and at the time the other company was created on May 13th, 1913, the undivided profits are charged with $25,150. The real estate account was credited with $50,150, and the notes payable charged $10,000.

Q. Does that show that real estate was transferred as a dividend?

A. No, sir.

Cross-examination.

By Mr. Garnett:

Q. How did you say it was transferred in that record?

A. In this record it was transferred as a sale at $15,000.

Q. That is the record transaction that it was sold for $15,000 by the Osage Mercantile Company to the Mercantile Real Estate Company?

A. Yes, sir.

[fol. 68] Q. Then it would necessarily show if the sale was only for $15,000 that the loss of $25,150 was charged off to undivided profits or profit and loss wouldn't it?

A. Not necessarily.

Q. Where did that go then?

A. That might have had the effect of a gift to the other corporation considering the fact that there was an equal inter-estate in both and each stockholder shared equally in the new arrangement.

Q. Well, what would it indicate on the books?

A. The books show a loss.

Q. Well, that was my question. The books show that a loss of $25,150 was entered growing out of this real estate transaction. It that right?

A. Yes, sir.

Q. You say that it might have been a gift from the old corporation to the new because the stockholders in the new corporation had exactly the same stock holdings as in the old. Is that your statement?

A Apparently this [entiry] is made only to clear the account. The way it was handled they had agreed among themselves, they were all equally interested——

Q. Wait a minute. Were you present when they made the agreement?

A. Certainly not.

Q. I suggest you testify from what the records show or from what knowledge you gained from them. My question is, you considered it might be a gift from the old company to the new company because the stockholders in the new company owned stock in the same proportion as in the old?

A. And because in filing their consolidated returns they claimed they had a paid in surplus into the new company.

Q. Of the actual fair market value of the real estate at that time?

A. Yes, sir.

Q. Now is there any other reason why you consider it a gift?

A. That would substantiate my reason.

Q. Did you consider it a gift and do you now consider it a gift from the old company to the new?

A. Yes, I think I should.

Q. Then it wasn't a dividend was it?

A. No.

Q. Mr. Dye, you took the book value assets on March 1st, 1913 and adjusted values by distributions from those made after that date did you?

A. Yes, sir.

[fol. 69] Q. Did you go back of that date to restore to March 1st value any items which have been charged off on the books and are still owned by the company?

A. I don't understand.

Q. Did you go back prior to March first in order to ascertain and to restore to surplus on March first 1913 any items which had been charged off on the books and were still owned by the company?

A. No, sir.

Q. You adjusted just on one side of that date, that is, the subsequent period?

A. I started at that time and built it down.

Redirect examination.

By Mr. Toomey:

Q. Are you a certified public accountant under the laws of the State of Oklahoma?

A. Yes, sir.

Q. Assuming that by this transaction they were merely making a division of their assets would it not be a usual way of handling that as a book-keeping entry to clear their books just as they did there?

A. I think so.

Recross-examination.

By Mr. Garnett:

Q. Let me see if I understand you clearly. Do you classify this transaction whereby the real estate was disposed of as a dividend, a sale or a gift, or a combination of two or more of them?

A. According to the book record it is a sale, but to make a strict sale there must be a willing buyer and willing seller, and if this had been with outside parties there couldn't have been such a sale.

Q. They would have asked a higher consideration. What do you term it then a gift or combination of sale and gift?

A. I should say it was a combination sale and gift.

Q. Not a dividend?

A. Not a dividend.

Redirect examination.

By Mr. Toomey:

Q. Might it not have been a split in their assets. Isn't that in effect what the books show?

A. No, I can't say that, because their records show a sale and their minute books show a sale.

[fol. 70] Recross-examination.

By Mr. Garnett:

Q. The result was that the assets were divided up and owned by two corporations after this transaction instead of being owned by only one as before?

A. Yes, sir.

Redirect examination.

By Mr. Toomey:

Q. And the result was a split of the assets wasn't it?

A. I'd rather not answer.

(Witness excused.)

Offer in Evidence

Mr. Toomey: I have a certified copy, a photostatic copy of a letter which I desire to have marked as an exhibit and introduce and that is our case.

The Court: On what subject?

Mr. Toomey: It is a letter written by the Osage Mercantile Company, an original paper on file in the department in which it sets forth their version of this transaction. It is a paper requesting that the Osage Mercantile Company and Osage Real Estate Company may consolidate their income and capital for the purpose of excess profits tax return.

Mr. Garnett: That is of no materiality here because the statute expressly authorizes affiliated corporations making consolidated returns.

The Court: Let it be received for what it is worth.

(Thereupon the instrument identified as Government's Exhibit (A), was received in evidence and is as follows.)

DEFENDANT'S EXHIBIT A

"Statement

The Osage Mercantile Co. was organized in 1902, under the laws of Oklahoma, with a capital stock of $15,000.00, which was increased to $30,000.00 by a stock dividend in 1906.

January 1st, 1913 its invested capital was $103,804.86 of which amount $50,150 was invested in real estate, as shown by inventory of that date.

On or about May 8th, 1913 this real estate was transferred to The Mercantile Real Estate Co., an Oklahoma corporation organized at that time and all the stock of that new [fol. 71] company was owned by the stockholders of the Osage Mercantile Co., in same proportion as these stockholders held stock in the Osage Mercantile Co.

Since that time all the stock of the real estate company has been owned by the stock holders of the Osage Mercantile Co. with the exception of a small interest, less than one-third.

In figuring Corporation Excess Profits we submit that the capital invested in the Mercantile Real Estate Co. should be added to the invested capital of the Osage Mercantile Co. for the reason that the two corporations are, in fact, a continuation of the one business established in 1902, the real estate being taken out of the mercantile business in 1913 to facilitate handling both branches of the business in accordance with Oklahoma law.

We respectfully ask that the figures of the two corporations be combined for the purpose of fixing amount due as Corporation Excess Profit Taxes, as follows:—

Assets, Merc. Real Estate Co., May 8th, '13		$50,150.00
New building, added since,		19,216.55
Surplus, Jan. 1st, 1917		10,942.73
		80,309.28
Less indebtedness, Jan. 1st, 1917		22,414.80
Invested capital, R. E. Co		57,894.48
Invested capital of Osage Merc. Co. Jan. 1st 1917, see statement		81,149.88
Total invested capital of the two corporations, Jan. 1st, 1917		$139,044.36
Profits, 1917, Osage Merc. Co	$43,729.08	
" " Merc. R. E. Co	1,810.90	
Combined profits	$44,539.95	

We herewith submit a consolidated return and respectfully ask acceptance of same as our report.

To pay the tax figure on our small invested capital would be inequitable as compared to other firms doing about the same volume of business in this section of the country, and whose invested capital is about the same [fol. 72] as the combined capital of our two corporations.

Respectfully submitted.

Osage Mercantile Company. W. C. Tucker, Pawhuska, Oklahoma.

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL AND PRAYER FOR APPROVAL

The undersigned, attorneys for the defendant, hereby acknowledge service of the bill of exceptions in the above entitled cause this 20th day of July, 1925.

We have examined the said bill of exceptions in the above entitled cause and have no suggestions or amendments to offer thereto and hereby consent that said bill of exceptions may be presented to the Hon. John H. Cotteral,

presiding and trial judge, at any time and place, and without further notice to us.

James A. Ingraham, Asst. U. S. Attorney, Attorneys for Defendant.

Prayer of Plaintiff for Approval of Bill of Exceptions

And now in furtherance of justice and that right may be done, the plaintiff, W. C. Tucker, presents the foregoing as and for his bill of exceptions in the above entitled cause, and prays that the same be settled, allowed, signed and filed as such.

Chas. H. Garnett, Attorney for Plaintiff.

In United States District Court

Order Settling Bill of Exceptions

Now on this 20th day of July, 1925, and within the time allowed by the order of the Court for the presentation and filing by the plaintiff of his bill of exceptions, comes the plaintiff above named by his attorney, Charles H. Garnett, Esq., and present to the Honorable John H. Cotteral, the judge who presided at the trial of said cause, the foregoing bill of exceptions, and prays that the same may be settled, [fol. 73] allowed, signed and ordered filed as a part of the record in said cause, which is accordingly done.

John H. Cotteral, United States District Judge, Western District of Oklahoma.

In United States District Court

Plaintiff's Motion for Judgment—Filed June 15, 1925

Comes now the plaintiff above named at the conclusion of all the evidence in the case and moves and asks the court to render judgment in his favor upon the evidence in the case and the law applicable thereto, for the sum of $6,642.13, with interest thereon at the rate of 6% per

annum from October 30, 1923, or the total sum at this date of $7,289.73 and for the costs of this action.

Chas. H. Garnett, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS—Filed June 13, 1925

Comes now the above named defendant, thru the undersigned his attorney, and at the close of all the testimony, both parties having rested, and moves the Court for judgment in his favor, for the dismissal of the plaintiff's petition and for his costs herein incurred.

James A. Ingraham, Assistant United States Att'y,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

No. 2990. Law

W. C. TUCKER, Plaintiff,

vs.

ACHL C. ALEXANDER, Collector of Internal Revenue, Defendant

JUDGMENT—Filed June 13, 1925

This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May 1925 Term of the [fol. 74] above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A. Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the Court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the

close of the day, Court recessed and the trial of the cause was continued to 9:00 o'clock A. M. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

Thereupon the cause was argued to the Court, and the Court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in the sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of the said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax return was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63 and that of the additional tax assessed against him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assessment to [fol. 75] have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March

1st, 1913, and which he realized upon in liquidation of said corporation on July 20th, 1920; that the assets of the corporation were not sold at liquidation, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a copartnership, the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913 the assets of said corporation consisted of the mercantile business proper including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation, known as the Mercantile Real Estate Company, with a capital stock of $15,000.00, was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholders in the old corporation; that said stockholders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence and the plaintiff still owns the stock which he acquired in it at its organization as above stated; that during the period be-

tween March 1, 1913 and May 14, 1913, the Osage Mer-
[fol. 76] cantile Company declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of real estate so transferred to the Mercantile Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividends to the extent of $5,796.53, distributed between March 1, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was assessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

The Court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913 value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that, therefore, the additional tax assessed by the Commissioner of Internal Revenue, with the exception of the sum of $216.26 above referred to, was properly and legally assessed, collected and paid.

The Court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913 was also enjoyed by the company at the time of its dissolution on

July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; [fol. 77] that any good will value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

The Court, therefore, finds the issues generally for the defendant, and further finds that since the Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a Treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

The Court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the defendant at the time excepted and his exception is allowed.

It Is Therefore, Considered, Ordered and Adjudged by the court that the motion of the plaintiff herein for judgment in his favor be, and it is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and it is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and ad-

judged against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed him by the Commissioner of Internal Revenue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty [fol. 78] days from this date in which to make, serve and file his bill of exceptions herein.

Done in open court this 13th day of June, A. D. 1925.

John H. Cotteral, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed July 20, 1925

To the Honorable John H. Cotteral, Judge of said Court:

Now comes W. C. Tucker, the plaintiff above named, by Chas. H. Garnett, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of Acel C. Alexander, Collector of Internal Revenue, the defendant above named, on the 13th day of June, A. D. 1925, hereby prays that a writ of error may be allowed him from the United States Circuit Court of Appeals for the Eighth Circuit to the District Court of the United States for the Western District of Oklahoma, and in connection with this petition, the petitioner herewith presents his assignment of errors.

The petitioner further prays that the amount of the bond for costs to be given by him upon allowance of such writ of error may be fixed by an order to be entered herein.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Writ allowed this 20th day of July, 1925, Bond fixed at $250.00 conditioned as the law directs.

John H. Cotteral, Judge of the District Court of the United States for the Western District of Oklahoma.

In United States District Court

Assignments of Error—Filed July 20, 1925

And now comes W. C. Tucker, the plaintiff above named and plaintiff in error upon the proceedings in error in the [fol. 79] Circuit Court of Appeals for the Eighth Circuit, by Chas. H. Garnett, his attorney, and in connection with his petition for a writ of error, says that in the record and proceedings and in the final judgment heretofore entered in this cause manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for a judgment in his favor made at the conclusion of the evidence on the trial.

2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below, for a judgment in his favor made at the conclusion of the evidence on the trial.

3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.

4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest

thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

8. The court erred in rendering judgment for the defendant in error for costs.

[fols. 80 & 81] 9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

11. The court erred in that its judgment is contrary to law.

By reason whereof, the plaintiff in error prays that the judgment aforesaid may be reversed and the cause remanded to the said trial court with directions to enter its judgment therein in favor of the plaintiff in error and against the defendant in error for the sum of $6,642.13 with interest thereon at the rate of six per centum per annum from the 30th day of October, 1923, and for his costs in the action, or that it be reversed and remanded with directions to the said trial court to grant a new trial.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Bond on writ of error for $250.00, approved and filed July 20, 1925, omitted in printing.

[fol. 82] In United States District Court

Præcipe for Transcript of Record—Filed July 24, 1925

The clerk of the above entitled court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for use in the United States Circuit

Court of Appeals for the Eighth Circuit, by including therein the following:

I. The Petition.

II. The Answer.

III. The Bill of Exceptions.

[fol. 83] IV. The Plaintiff's Motion for Judgment at the Conclusion of the Evidence.

V. The Defendant's Motion for Judgment at the Conclusion of the Evidence.

VI. The Journal Entry of Judgment.

VII. The Assignments of Error.

VIII. The Petition for Writ of Error and Order Allowing same and Fixing Cost Bond.

IX. The Writ of Error.

X. The Bond for Costs.

XI. The Citation.

XII. The Præcipe For Transcript and Election to Print Record.

The plaintiff in error also hereby elects to have the record in the said cause printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 21st day of July, 1925.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Service of the within and foregoing præcipe is hereby acknowledged and accepted on behalf of the defendant in error, and the defendant in error hereby waives the designation of any additional parts of the record in said cause to be included in the transcript ordered in the said præcipe and consents that the said transcript shall be made up of and shall contain the parts of the record designated in the said præcipe.

Dated this 21st day of July, 1925.

James A. Ingraham, Assistant United States District Attorney for the Western District of Oklahoma.

[fol. 84] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 85] Appearances of counsel omitted in printing.

[fol. 86] Minute entry of argument and submission January 21, 1926, omitted in printing.

[fol. 87] In United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1926

No. 7124

W. C. Tucker, Plaintiff in Error,

vs.

Acel C. Alexander, Collector of Internal Revenue, Defendant in Error

In Error to the District Court of the United States for the Western District of Oklahoma

Mr. Charles H. Garnett for plaintiff in error.

Mr. Frederick W. Dewart, Special Attorney, Bureau of Internal Revenue (Mr. Roy St. Louis, United States Attorney, Mr. William P. Kelley, Assistant United States Attorney, and Mr. A. W. Gregg, Soliciter of Internal Revenue, were with him on the brief), for defendant in error.

Before Stone, Van Valkenburgh, and Booth, Circuit Judges

Opinion—Filed October 27, 1926

Stone, Circuit Judge, delivered the opinion of the court.

This is an action for refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for the year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the Department, thereafter, resulted in an additional assessment, which was paid under protest,

In due time after this last payment, plaintiff filed his claim for refund. After waiting seventeen months, in vain, for some action thereon by the Department, this action was [fol. 88] brought. About six months after this action was begun and before trial thereof, the Department made an allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant but without prejudice to acceptance by plaintiff of the allowance of $216.26, this writ of error is sued out.

In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Oklahoma. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a copartnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to the date of liquidation in 1920.

There are two main contentions here. One is of minor importance, concerning costs herein.

The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

"That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300

shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed [fol. 89] in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took $356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders."

The collector contends that the plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy Commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

"The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full

amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the Claim for Refund. Hence, the above point raised by the Collector must be determined. We think the Collector is right for the reasons following:

[fol. 90] This is a suit against the Government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Internal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the Claim. As no ground in this petition is stated in the Claim for Refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

The minor claim affects only costs and arises out of the the fact that the Commissioner allowed a refund of $216.00. The tax was paid, under protest, on October 30, 1923; the claim for Refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the Statute, six months after the claim was filed within which to determine the Claim and within which time plaintiff could not bring suit. As the Commissioner did not act within that period, the plaintiff was within his rights in bring suit. If he had based his suit upon any ground contained in the Claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not [fol. 91] secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

The judgment should be and is affirmed.

[fol. 92] In United States Circuit Court of Appeals

[Title omitted]

Judgment—November 1, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Acel C. Alexander, Collector of Internal Revenue, have and recover against W. C. Tucker the sum of Twenty Dollars for his costs herein and have execution therefor.

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR STAY OF MANDATE

Comes now W. C. Tucker, the plaintiff in error in this proceeding, and moves and asks the Court to make and enter herein its order staying the issuance by the clerk of the mandate of this court to the court below upon the decision and judgment rendered herein by this Court on the 27th day of October, 1926, until the further order of the Court [fol. 94] in respect to the issuance thereof.

As grounds for his motion the plaintiff in error says that he has prepared and is filing with this motion a petition for rehearing upon the issues presented to this Court in this proceeding, and that he verily believes that there is substantial merit in said petition for rehearing and that the same should be granted.

And also that he is preparing, and will present within the time limited for doing so, a petition to the Supreme Court of the United States for review on writ of certiorari of the said decision and judgment of this Court in this proceeding.

And also that there is no pressing reason why the said mandate from this Court should be issued immediately, for that the judgment of the lower court, which is affirmed by this Court, was in favor of the defendant in error and against the plaintiff in error for costs, and that the plaintiff in error was plaintiff below, and as such made and maintained a sufficient deposit to cover all costs incurred in said court, and as plaintiff in error in this court has made and maintained a cost deposit sufficient to cover all costs incurred in this court, and that all costs incurred by him, both in the court below and in this court, have been paid as incurred, and likewise all costs incurred by the defendant in error, both in the court below and in this court, have been paid as incurred out of the cost deposits made and maintained by the plaintiff in error for that purpose.

There is, therefore, no relief to be obtained by the defendant in error upon the issuance of the said mandate and [fol. 95] the receipt and filing of it in the court below, and no detriment to be suffered by the defendant in error or

anyone else by reason of delay in the issuance of the said mandate. Hence, it would seem that it is entirely right and proper that this Court should withhold the issuance of its mandate and retain jurisdiction in this proceeding to reconsider its said judgment and decision upon the petition for rehearing of the plaintiff in error for that purpose, and if it should be deemed right and proper to modify its present decision and judgment or to recall and vacate the same upon rehearing and render a new and different decision and judgment as prayed for by the plaintiff in error.

Wherefore, the plaintiff in error prays that his said motion for an order staying the issuance of the mandate of this Court in this cause until the further order of this Court in the premises be sustained and granted and such order made.

Chas. H. Garnett, Attorney for Plaintiff in Error.

[fols. 96 & 97] Petition for rehearing, covering two pages, filed December 24, 1926, omitted from this print. It was denied and nothing more by order January 15, 1927.

[fol. 98] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing and Staying Issuance of Mandate—January 15, 1927

This cause came on this day to be heard upon the petition for a rehearing and for a stay of the mandate of this Court, filed by counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

It is further ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of 40 days from and after this date pending a petition to the Supreme Court of the United States for a writ of certiorari, unless said petition shall have been sooner disposed of.

[fol. 99] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

JAN 24 1927
WM. R. STANSBURY
CLERK

No. [redacted] 167

In the Supreme Court of the United States

W. C. TUCKER,
Plaintiff in Error and Petitioner,

vs.

ACEL C. ALEXANDER, Commissioner of Internal Revenue,
Defendant in Error and Respondent.

PETITION FOR WRIT OF CERTIORARI

CHARLES H. GARNETT,
Attorney for Petitioner and Plaintiff in Error.

Utterback Typesetting Co., Scott-Thompson Bldg., Oklahoma City. W. 4050

INDEX

SUBJECT

	Page
Petition in suit filed in trial court	1- 4
Claim for refund of tax filed with Commissioner	5- 6
Answer of defendant in trial court	6
Finding of facts and judgment of trial court	6-11
Assignment of errors in Circuit Court of Appeals	12-14
Decision and judgment of Circuit Court of Appeals	14-19
Conflict with decision of another Circuit Court of Appeals as ground for writ	19-22
Important unsettled questions of Federal Law as ground for writ	22-24
Decision probably untenable and in conflict with weight of authority as ground for writ	24-26
Prayer for writ	26-27
Verification to petition	27-28
Brief and Argument:	
First ground for writ	29
Second ground for writ	31
Third ground for writ	46

TABLE OF CASES AND STATUTES

Walker vs. Gulf & I. Ry. Co. of Texas, 269 Fed. 885	19-21
Redwing Malting Co. vs. Willcuts, Collector, not reported	24-42
Rev. Stats., Sec. 3220, as Amended by Sec. 1315 Revenue Act of 1921	33
Rev. Stats., Sec. 3226, as Amended by Sec. 1318, Revenue Act of 1921	22-23

In the Supreme Court of the United States

W. C. TUCKER,
Plaintiff in Error and Petitioner,

vs.

ACEL C. ALEXANDER, Commissioner of Internal Revenue,
Defendant in Error and Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of The United Statess

The petition of W. C. Tucker, plaintiff in error, respectfully shows to this Honorable Court that he filed in the District Court of the United States for the Western District of Oklahoma his petition in an action at law on October 21, 1924, against Acel C. Alexander, Collector of Internal Revenue for the District of Oklahoma, as defendant, which petition, omitting the title thereof and exhibits attached thereto, is as follows:

[R. 3] "Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander as Collector of Internal Revenue, the defendant above named, alleges and says:

"(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma

County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

"(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Revenue under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten days after the [R. 4] date thereof, a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true and correct copy of which notice and demand is hereto attached, marked Exhibit 'A' and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 30, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit 'B' and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

"(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he

was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed *in specie* to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired, and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and [R. 5] illegally assumed and took *$356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his

*Corrected by a trial amendment by permission of the court with consent of the defendant to $203.71 [R. 43]. By mistake the original figures instead of the amended ones appear in the transcript of the record.

income tax return for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation as a deduction fro income, but concluded said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggerated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

"(4) That on the 2nd day of November, 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax, so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit 'C' and made a part hereof; and that more than six months have elapsed since the filing of said claim with said Commissioner and he has not rendered a decision thereon.

"Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84, with interest thereon at the rate of 6 per cent per annum from the 30th day of October, 1923, and the costs of the action."

That Exhibit "A" to the foregoing petition, being the claim for refund of the tax sued for, was made upon the printed form prescribed and provided for that purpose under regulations established by the Secretary of the Treasury pursuant to law, and contained the following statement of the grounds upon which the claimant believed the refund of tax should be allowed:

[R. 57] "That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT:PA:FR-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment."

By reference, as held by the Circuit Court of Appeals, the following more specific statement of the grounds relied upon was adopted into and made a part of the said claim:

[R. 57.] "The tax payer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obliga-

tion to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

That on February 9, 1925, the defendant filed his answer to the said petition, which answer is as follows:

> "Comes now the defendant above named, and for answer to the petition of the plaintiff herein, denies each and every allegation therein contained."

That said cause was heard and determined by the court, after the parties thereto had waived trial by jury in writing, and on the 13th day of June, 1925, findings of fact were made and judgment was entered thereon in said court, as follows:

[R. 73.] "This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May, 1925, Term of the [R. 74] above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A . Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the close of the day, court recessed and the trial of the cause was continued to 9:00 o'clock A. M. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

"Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with

interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

"Thereupon the cause was argued to the Court, and the Court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in the sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of the said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of said claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax return was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63, and that of the additional tax assessed against him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assessment [R. 75] to have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March 1st, 1913, and which he realized upon in liquidation of said corporation on July 20th, 1920; that the assets of the corporation were not sold at liquida-

tion, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a co-partnership the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913, the assets of said corporation consisted of the mercantile business proper including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation, known as the Mercantile Real Estate Company, with a capital stock of $15,000.00, was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholdings in the old corporation; that said stockholders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence and the plaintiff still owns the stock which he acquired in it

at its organization as above stated; that during the period between March 1, 1913, and May 14, 1913, the Osage Mercantile Company [R. 76] declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of the real estate so transferred to the Mercantitle Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividend to the extent of $5,796.53, distributed between March 21, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was assessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

"The Court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913, value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that, therefore, the additional tax assessed

by the Commissioner of Internal Revenue, with the exception of the sum of $216.26, above referred to, was properly and legally assessed, collected and paid.

"The Court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913, was also enjoyed by the company at the time of its dissolution on July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; that any good will [R. 77] value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

"The Court, therefore, finds the issues generally for the defendant, and further finds that since the Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a Treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

"The Court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the defendant at the time excepted and his exception is allowed.

"It is, therefore, considered, ordered and adjudged by the Court that the motion of the plaintiff herein for judgment in his favor be, and is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and adjudged against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed him by the Commissioner of Internal Revenue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

"Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty [R. 78] days from this date in which to make, serve and file his bill of exceptions herein.

"Done in open court this 13th day of June, A. D. 1925."

That thereafter, to-wit, on the 20th day of July, 1925, a writ of error was allowed from the United States Circuit Court of Appeals for the Eighth Circuit to the said District Court of the United States for the Western District Court of Oklahoma in said cause, and such pro-

ceedings were had under said writ of error that on the 5th day of August, 1925, a transcript of the record and all the proceedings in said cause in said United States District Court for the Western District of Oklahoma was filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, in the state of Missouri, and said cause was entered and docketed in said Circuit Court of Appeals, entitled W. C. Tucker, Plaintiff in Error, vs. Acel. C. Alexander, Collector of Internal Revenue, Defendant in Error, and numbered 7124 on said docket, and full jurisdiction over the parties and the subject matter in said cause for reviewing the same upon said writ of error was thereupon acquired and assumed by the said Circuit Court of Appeals.

That the assignment of errors filed in said cause was as follows:

[R. 78.] "And now comes W. C .Tucker, the plaintiff above named and plaintiff in error upon the proceedings in error in the [R. 79] Circuit Court of Appeals for the Eighth Circuit, by Chas. H. Garnett, his attorney, and in connection with his petition for a writ of error, says that in the record and proceedings and in the final judgment heretofore entered in this cause manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

"1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for judgment in his favor made at the conclusion of the evidence on the trial.

"2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below,

for judgment in his favor made at the conclusion of the evidence on the trial.

3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.

"4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

"5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.53 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

"6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from October 30th, 1923, and costs of the action.

"7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six percentum per annum from October 30th, 1923, and costs of the action.

"8. The court erred in rendering judgment for the defendant in error for costs. [R. 80.]

"9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

"10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

"11. The court erred in that its judgment is contrary to law.

"By reason whereof, the plaintiff in error prays that the judgment aforesaid may be reversed and the cause remanded to the said trial court with directions to enter its judgment therein in favor of the plaintiff in error and against the defendant in error for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and for his costs in the action, or that it be reversed and remanded with directions to the said trial court to grant a new trial."

That afterwards, to-wit, on the 21st day of January, 1926, the case came on to be heard in the said Circuit Court of Appeals, before the Honorable Kimbrough Stone, the Honorable Arba S. Van Valkenburgh, and the Honorable Wilbur F. Booth, and on the 27th day of October, 1926, a decision and judgment was rendered and entered therein by the said Circuit Court of Appeals as follows:

"STONE, Circuit Judge, delivered the opinion of the court.

"This is an action for a refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for the year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the Department, thereafter, resulted in an additional assessment, which was paid under protest. In due time after this last payment, plaintiff filed his claim for refund. After waiting seventeen

months, in vain, for some action thereon by the Department, this action was brought.. About six months after this action was begun and before trial thereof, the Department made allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant but without prejudice to acceptance by plaintiff of the allowance of $216.26, this writ of error is sued out.

"In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

"Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Oklahoma. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a co-partnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to date of liquidation in 1920.

"There are two main contentions here. One is of minor importance, concerning costs herein.

"The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

" 'That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolu-

tion of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders.'

*These figures are in error. They should be $203.71. See transcript of record in trial court, page 43.

"The collector contends that plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy Commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

" 'The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.'

"It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the Claim for Refund. Hence, the above point raised by the Collector must be determined. We think the Collector is right for the reasons following:

"This is a suit against the Government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but

certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Intetrnal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the Claim. As no ground in this petition is stated in the Claim for Refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

"The minor claim affects only costs and arises out of the fact that the Commissioner allowed a refund of $216.00. The tax was paid, under protest, on October 30, 1923; the Claim for Refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the Statute, six months after the claim was filed within which to determine the Claim and within which time plaintiff could not bring suit. As the Commissioner did not act within that period, the plaintiff was within his rights in

bringing suit. If he had based his suit upon any ground contained in the Claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

"The judgment should be and is *Affirmed.*"

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

Your petitioner says that the case should be so certified for revision to this Honorable Court for the following reasons:

(1) The said decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals on the same matter to-wit, the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891.

The conflict in the two decisions lies in this, that

in the decision in the instant case the Eighth Circuit Court of Appeals holds that in a suit for the recovery of income taxes alleged to have been erroneously and illegally assessed and collected under the Federal Revenue laws, no grounds for recovery may be alleged in the petition except the same and only such as have been previously presented in a claim to the Commissioner of Internal Revenue for refund of such taxes, and that the question of the sufficiency of the grounds alleged in such claim for refund, and of their identity with the grounds alleged in the petition upon suit, is jurisdictional, and is not waived by a failure to raise and present it for consideration and determination in the trial court, but that it may be raised and presented for the first time in an appellate tribunal where the case is up for review of a judgment upon the merits of the action. The language of the court in its decision on this point is as follows:

> "The purpose of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct."

The decision of the court in this case does not af-

firmatively show that the question of the insufficiency of the claim for refund and of the alleged difference between the grounds stated therein and those stated in the petition in the suit for recovery of the taxes, was not raised in the court below, but was first raised in said Circuit Court of Appeals, yet this fact fully appears from the record. [R. 11-15, 65, 73-78.]

The Fifth Circuit Court of Appeals in the Walker case holds that the question of the sufficiency of a claim for refund to support the particular action for recovery of taxes, and in fact the question of whether or not any such claim was filed at all prior to suit, is not jurisdictional, and is waived by the defendant unless it is raised and objection to the sufficiency of such claim, or to the failure to file a claim, is made in the trial court, and that such question can not be raised for the first time in the Circuit Court of Appeals when the case comes there for review. The language of that court in that case on this point is as follows:

> "The question was raised in this court that the record failed to show a demand for refund of the tax after its payment, as required by Rev. Stat., Sec. 3226 (Comp. St. Sec. 5949). This case is not like that of *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 54 Ct. Cl. 22, recently affirmed by the United States Supreme Court (254 U. S. 141, 41 Sup. Co. 55, 65 L. Ed. . .). There, as both courts point out, the payment was without protest, or any notice that the refusal to abate was not acquiesced

in. Here, when making the payments, the railway filed its written notice, claiming that each assessment was erroneous, that the original return showing no tax to be due was correct, that the tax was paid under protest to avoid incurring the penalties, and that an action would be brought by the railway to recover the same. This might well be considered a demand for a refund on payment under protest. But, regardless of that, no such question was raised in the District Court, nor by the assignments of error. Had it been, it might have been met by further allegation and proof, if such were necessary. We do not think it can be raised here for the first time *(Retzer* v. *Wood, Collector,* 109 U. S. 185, 3 Sup Ct. 164, 27 L. Ed. 900; *Green County* v. *Thomas' Executor,* 211 U. S. 598, 602, 29 Sup. Ct. 168, 53 L. Ed. 343)."

(2) The decision of the Eighth Circuit Court of Appeals in the instant case presents three important questions of federal law which have not been, but should be, settled by this court.

The first question is: How complete, detailed and specific must be the statement of the facts relied on in a claim for refund of taxes filed with the Commissioner of Internal Revenue under the provisions of Revised Statutes, *Sec. 3226, to constitute a sufficient compliance

*Sec. 3226. (Amended by Sec. 1318, Revenue Act of 1921). No suit or preceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal

with that statute and to be made the basis of a subsequent suit to recover the taxes claimed to be refundable?

The second question is: Is the plaintiff in an action to recover federal income taxes limited in his petition and in his suit to the precise, same and only grounds as a basis for recovery which were stated and alleged in his claim as grounds for a refund, or may he bring forward in his suit and rely upon a ground for recovery not previously stated in his claim for refund?

The third question is: Assuming that the grounds relied on in the suit must be the same as those relied on in the claim, may the statement of them in the petition upon suit be substantially and generally the same, being based upon and relating to the same subject matter and the same transactions, as those stated in the claim for refund, or must they be stated in the petition precisely, specifically and in detail just as they have been in the claim?

These are important questions of federal law which have not been settled by this court, and which affect the

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Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum.

"This section shall not affect any suit or proceeding instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress."

interests of thousands of taxpayers who have filed or are filing claims for refund of income taxes with the Commissioner of Internal Revenue, and which also affect the attitude and policy of the Bureau of Internal Revenue in passing upon and determining such claims and in defending suits by taxpayers for the recovery of such taxes. There is no guide in the statutes as to the contents of such a claim for refund, and no requirement that a suit brought to recover taxes shall be based solely and only upon the grounds previously stated in such claim as the basis for a refund. There are no court decisions upon these questions prior to the two cited above. There is a subsequent decision by the Eighth Circuit Court of Appeals in which the ruling announced by it in the instant case is restated and adhered to. *Redwing Malting Co.* v. *Willcuts, Collector*, No. 7242, decided Nov. 5, 1926. But these questions are open and undecided by any controlling decision of this court, and surely are of sufficient importance and of sufficient public concern to deserve and require final and conclusive answers by this court.

(3) The Eighth Circuit Court of Appeals in the instant case has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority, and has so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this Court's power of supervision. As stated above no question of the sufficiency of the claim for refund, which was filed by the plaintiff in error with the Commissioner of Internal Revenue prior to the commencement of suit and as a basis therefor was raised, presented, considered or decided in the trial court. In that court both the plaintiff, the defendant and the court assumed without question that the claim as filed was a sufficient compliance with the statute and was a sufficient basis for the suit, and acting upon such assumption, the court in its judgment considered, passed upon and decided the merits of the plaintiff's cause of action, without the least regard to the contents of the claim for refund. It was only incidentally upon the trial, and through a letter from the Commissioner under date of April 24, 1925, introduced in evidence by the plaintiff in error for the purpose of showing that his claim for refund had in fact been allowed by the Commissioner for the sum of $216.26 and rejected for the remainder, that any purported statement in detail of the grounds on which the claim for refund was based, came into the record at all. It was only after the case reached the Circuit Court of Appeals for review that the defendant in error raised the question of the sufficiency of the claim for refund to support the plaintiff in error's cause of action as alleged in his petition. That court, as shown above, held the claim insufficient and on that

ground alone affirmed the judgment of the trial court. If the sufficiency of the claim for refund was not jurisdictional, then the holding of the Circuit Court of Appeals is certainly untenable, and in conflict with the weight of authority to the effect that any point in a case not jurisdictional can not be raised for the first time in an appellate court, and constitutes a departure from the usual and accepted course of judicial proceedings.

On the other hand, if the question of the sufficiency of the claim for refund as a basis for the plaintiff in error's cause of action as alleged in his petition was jurisdictional, then the trial court had no jurisdiction to hear, try, decide and render judgment upon the merits of the action, and such judgment should be held void for want of jurisdiction, and the Circuit Court of Appeals, when this point of jurisdiction was first raised before it and was held to be fatal to the jurisdiction of the trial court, should have held, in accordance with the accepted and usual course of judicial proceedings, that the judgment of the trial court was void for want of jurisdiction, and should have reversed such judgment and remanded the cause with directions to dismiss the action for want of jurisdiction.

Wherefore, the petitioner respectfully prays that a Writ of Certiorari be issued under the seal of the Court, directed to the United States Circuit Court of

Appeals for the Eighth Circuit, sitting at the City of St. Louis, in the State of Missouri, commanding the court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Acts of Congress establishing the Circuit Courts of Appeals and defining and regulating their jurisdiction, and providing for the certification of causes from them to this Honorable Court for review and determination; and that the said judgment of the said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as may seem proper.

And your petitioner will ever pray.

CHARLES H. GARNETT,
Attorney for Petitioner.

State of Oklahoma,
Oklahoma County, ss.

Charles H. Garnett, being first duly sworn, on his oath says that he is attorney for the above named petitioner, W. C. Tucker, in the above mentioned action and proceeding; that he has read the foregoing petition subscribed by him as attorney for the said petitioner, and knows the contents thereof; that he has personal knowledge of all proceedings had in the said cause above men-

tioned from the time the same was first instituted in the trial court, and has personal knowledge of the truth of the facts stated in the foregoing petition; and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES H. GARNETT,

Subscribed and sworn to before me this 19th day of January, 1927.

(Seal) V'Roy Harrison, *Notary Public.*
My commission expires April 8, 1928.

BRIEF AND ARGUMENT

First Ground for Writ

The first ground assigned in the petition for a writ of *certiorari* is that of a conflict between the decision of the Eighth Circuit Court of Appeals in the instant case and that of the Fifth Circuit Court of Appeals in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891. There is little to be said by way of argument upon this point. A comparison of the two decisions shows that they are squarely in conflict. In the instant case the facts are that a claim for refund was duly filed and was retained by the Commissioner without action for more than six months before suit was begun, and that upon the trial of the case no question as to the fact nor as to the sufficiency of this claim for refund was raised. But the Circuit Court of Appeals held that, notwithstanding these facts, the grounds assigned by the plaintiff in error in his claim for refund were so different from those alleged in his petition that the court had no jurisdiction to entertain and decide his suit upon the grounds alleged, and that objection to the jurisdiction on this ground could be raised for the first time in the appellate court.

In the Walker case the Fifth Circuit Court of Appeals not only refused to consider the question of the contents and sufficiency of the claim for refund, when that question was not raised in the trial court and was

raised for the first time before it, but even went further and indicated that no proof whatever of the filing of any such claim was required in the lower court, unless that point was raised and objection made by the defendant upon the trial.

It is clear that if the instant case had been before the Fifth Circuit Court of Appeals an entirely different and a contrary decision to that of the Eight Circuit Court of Appeals would have been rendered upon the question considered. And as it now stands there is one rule of law within the jurisdiction of the Fifth Circuit Court of Appeals governing the filing and contents of a claim for refund of income taxes and the grounds for recovery that may be asserted and relied upon in a suit following a rejection of such claim, and an entirely different one within the jurisdiction of the Eighth Circuit Court of Appeals. The law is not the same to every citizen regardless of his place of residence. The citizen of the Fifth Circuit has his rights measured and determined by one rule, while the citizen of the Eighth Circuit in precisely in the same situation has his rights measured and determined by an entirely different rule. This condition of affairs is wrong and not to be tolerated longer than is necessary for this Court to declare the true and correct rule to be applied everywhere in measuring the rights of every citizen depending upon the same state of facts

—whether the Fifth Circuit Court of Appeals or the Eighth Circuit Court of Appeals is right or whether the right lies somewhere between their respective positions.

Second Ground for Writ

This ground raises the question of the general importance of a construction and interpretation by this Court of Revised Statutes, Sec. 3226, as to how precise, definite and specific a statement of facts the taxpayer must set forth as grounds for his claim for refund of taxes to make such claim legally sufficient to be considered and passed upon by the Commissioner and likewise legally sufficient to confer jurisdiction upon a court in an action for the recovery of the taxes claimed to be refundable, and also the extent to which the taxpayer in a suit to recover taxes is limited and restricted, if at all, to precisely the same grounds stated in his claim for refund.

Counsel for the plaintiff in error says from his personal experience, and from the experience of others of which he has knowledge, that it is the common practice of taxpayers claiming refunds to set out the grounds therefor as briefly and concisely as possible and hence broadly and in general terms, and that such practice has apparently had the approval of the Commissioner of Internal Revenue. Evidence in the form of affidavits, state-

ments and documents may be and generally are submitted with and in support of a claim for refund and this evidence should and does go into detail as to the precise facts and grounds upon which the claim rests. Thus a marked distinction is made between the averments in the claim of the ultimate facts upon which the taxpayer relies and the detailed and primary facts presented by the evidence to support the general averments of the claim. For this reason it is of grave importance to taxpayers generally to know whether or not a claim for refund of taxes must allege precisely and in detail every fact and every item of evidence upon which the claim is based or which the claimant might desire later to bring forward in a suit to recover the taxes, if the claim for refund be not granted, and also to know whether or not he is barred from asserting in the suit any ground for recovery of the taxes discovered after the filing of a claim, and hence not included therein.

The statute and the decisions make it clear that the filing of a claim for refund and its rejection by the Commissioner, or its retention by him without action for six months, is a condition precedent to the right to maintain a suit to recover income taxes. But neither the statute nor any court decision lays down any sort of restriction, limitation, requirement, prescription or provision as to what such claim for refund shall contain. The

statute, Revised Statutes, Sec. 3220, as amended by Sec. 1315 of the Revenue Act of 1921, authorizes the Secretary of the Treasury "to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected." It would appear, therefore, that an averment in a claim that the taxes sought to be refunded were erroneously and illegally assessed and collected would be a sufficient compliance with the statute. The duty would then rest upon the claimant to support such averment by evidence sufficient to establish that the taxes had been erroneously and illegally assessed and collected.

The position taken by the Eighth Circuit Court of Appeals, followed to its logical conclusion, would mean that the filing of a claim for refund was in fact the commencement of an action to recover the taxes, and that the claim itself was in effect the claimant's pleading or statement of his cause of action, and that he was thereafter forever bound by the theory and grounds for relief asserted in his claim and could not ever thereafter change such theory or grounds or take a new position or assert any new ground, even when he went into court. And if the filing of the claim is the commencement of the action, then when the same has been rejected by the Com-

missioner and suit is brought in court, such suit is in effect nothing more than an appeal from the Commissioner's action, and the issues in the case in court must be confined to the issues made up before the Commissioner on the claim for refund. Indeed, the position taken, if followed to its logical conclusion, would lead further and would preclude the taxpayer from producing in court in support of his suit any evidence in addition to or other than that presented to the Commissioner, because if the Commissioner must have before him all the averments of fact in support of the claim in order for him to pass upon the merits of it intelligently and correctly, he should also have before him all the evidence which the taxpayer has to support the claim. Otherwise, the taxpayer might withhold evidence from the Commissioner, or might discover new evidence after the Commissioner had rejected his claim, which, if it had been presented to the Commissioner, might have required or caused the allowance of the claim and have rendered the suit unnecessary. If this rule obtained, then any suit brought for the recovery of taxes after the rejection of a claim by the Commissioner would be nothing more nor less than an appeal from the Commissioner to the court, and the power and jurisdiction of the court would be limited merely to a review of the correctness of the Commissioner's decision upon the averments of fact in the claim and the evidence presented

before him. Clearly, there is nothing in the statute which requires or supports this procedure and no court decision has been cited which even indicates it.

The correctness of such procedure is negatived by the fact that the Commissioner is not required to assign any reason for rejecting a claim and is not required to act on it within any fixed time or at all. He may hold it indefinitely. But, after six months, the claimant may bring suit as though the claim were rejected. That is what the plaintiff in error did in this case. But, if the claim is the basis of a subsequent action in court to recover the taxes, and if the claimant must specify in his claim the precise grounds on which he relies and is thereafter to be precluded from asserting any new, additional or different ground, then it would seem that the Commissioner should be *required* to pass on the claim, and to state in detail his ground for rejecting it, in order that the issues for the suit might be fully made up on both sides, the claim constituting the statement of the claimant's cause of action, and the reasons for its rejection the Commissioner's defense thereto. And if the claimant should be restricted in his suit to the evidence adduced before the Commissioner, then the defense in the suit should likewise be restricted to the evidence on which the Commissioner relied in rejecting the claim.

It is not conceivable that the law would estop a taxpayer from adopting a new theory in court, or varying the theory on which his claim was presented to the Commissioner, or alleging any new or additional facts in court, or varying those presented before the Commissioner, and at the same time would permit the Government or the Collector as defendant to have full liberty to adopt any theory of defense to the suit, or bring forward any facts available in defense without regard to the theory or the facts upon which the Commissioner rejected the claim or held it without action. Indeed, since the Commissioner is not required to act on the claim at all, there can be no estoppel as to the defendant in the suit, and there can be no framing of the issues on both sides of the controversy before the Commissioner, and upon no principle of justice, fairness and equality before the law could it be held that the issues are made up and fixed beyond possibility or variation as to one party to the controversy and no restriction at all placed upon the other.

The reason assigned by the Circuit Court of Appeals for its holding is that the full merits of the taxpayer's claim should be presented to the Commissioner so that he might pass upon and allow the same, if it deserved allowance, and thus "spare the parties and the courts the burden of litigation in respect thereto." This reasoning seems sound as a general principle, but as a

basis for denying the right to a recovery in suit upon any ground other than that stated in the claim for refund, it is clearly unsound. The object of a claim for refund is to recover money which the claimant thinks he is entitled to. An action at law is for the same purpose. It is not conceivable that any considerable number of citizens would purposely present their claims for refund in such form as to conceal from the Commissioner the real grounds on which they hoped to get the money, or would intentionally withhold from him any evidence which would tend to establish their rights to the money, so that he might reject their claims and thus give them a chance to sue in court to recover the same thing they would have obtained, if the claims had been allowed. Surely, not many people, if they could get the money sought by a claim for refund, would prefer to have such claim rejected so that they might have an opportunity to bring a suit in court, with its attendant expense of costs, attorney's fees, and time, to get the same money. Such action would be contrary to the established rules of human conduct. If, in the suit, any new theory is asserted, or any new facts alleged, or any new evidence produced, it may be considered certain that these grounds were overlooked or were not available when the claim was presented to the Commissioner. And is not the necessity of bringing suit sufficient penalty to the

claimant for having overlooked any fact, ground or evidence which he might have presented to the Commissioner?

In this connection as illustrating the importance and concern with which the decision of the Circuit Court of Appeals in the instant case is regarded by those familiar with and directly interested in the question of the correct procedure in presenting claims for refund to the Commissioner, the comment on the case by the editors of the Commerce Clearing House Federal Tax Service is submitted. This service is prepared, edited, published and distributed by experts and specialists in matters relating to the interpretation and administration of the federal revenue laws, and is relied upon by thousands of subscribers for information and advice in respect of proceedings under such laws. The institution maintains offices in New York, Washington and Chicago, and describes itself as, "A complete and highly specialized organization devoted to editing and serviceing authoritative systems of information on taxation."

The quoted matter is presented here, not as an authority that is entitled to consideration by this Court, but for what it merits as an expression of the views of the writer, who is one skilled in tax matters and wholly without any personal interest in the outcome of the instant suit. The quotation is from page 5179 of Volume

2, Commerce Clearing House Federal Tax Service 1926, as follows:

> *"Recovery of Taxes by Suit Must Be Upon Grounds Stated in Claim for Refund. Application by Recent Court Decision Seems Incorrect."*
>
> "A recent court decision, in applying the principle that taxes may be recovered by a taxpayer by suit upon grounds only as stated in the claim for refund, would bar many taxpayers from refunds, if the decision is correct. The taxpayer brought suit to recover additional taxes which he was required to pay upon the receipt of liquidating dividends of a corporation in 1920. In the taxpayer's petition before the court the taxpayer alleged the March 1, 1913, value of the stock which he held in the corporation on that date, the net actual and fair market value of the assets distributed upon dissolution, that such assets were less in value than the fair market value of his stock on March 1, 1913, and that the Commissioner erroneously took a certain sum as the fair market value of his stock on March 1, 1913, instead of the correct sum, as stated in the petition, and that the Commissioner used a certain sum instead of the correct sum as the net actual and fair market value of the assets of the corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by the stockholders. It was contended on behalf of the Government that the taxpayer could not recover because the grounds in his petition before the Court were different from those asserted in his claim for refund. The grounds in the claim for refund were that the Department used the book value of the taxpayer's stock on March 1, 1913, instead of the fair market value on that date, as the basis for determining gain from the liquidation; that the Department did not deduct from the capital and surplus of the company at the time of liquidation the full

amount of its outstanding liability, and that the Department did not take into account the reduction of the value of the assets of the company at liquidation on account of certain outstanding obligations. The Court stated that 'the grounds relied upon in the petition for refund were entirely different from those contained in the claim for refund.' * * * It will be noted that the claim for refund involves the same transaction which is described in the taxpayer's petition before the Court. Had the taxpayer filed a claim for refund to recover the additional taxes which he was required to pay upon the liquidation dividend, and then later brought suit to recover taxes, alleging that he had not been allowed sufficient depreciation or alleging some other ground in no way connected with the liquidation of the corporation, it would seem that a court might be correct in refusing to allow him to bring suit without having made a claim for refund based upon the disallowance of such depreciation, or such other ground. However, in the above case the taxpayer is not bringing suit for the recovery of taxes paid in connection with a different transaction than that referred to in the claim for refund. The case seems incorrect.

"*Tucker* v. *Alexander*, U. S. C. C. A., Eighth Circuit."

For the same reason attention is called to the following paragraph from *The Kiplinger Tax Letter*, dated December 20, 1926, from the Kiplinger Washington Agency, Albee Bldg., Washington, D. C., an institution of a similar, though somewhat different, nature to that of the Commerce Clearing House:

"*Possibility that many taxpayers will be barred from refunds* is seen in recent court decision that

> taxes may be recovered by suit only upon grounds stated in claim filed with Bureau. This is case of *Tucker* v. *Alexander,* decided by the Eighth Circuit Court. General view here is that finding is faulty, and will not stand on appeal; that claim is sufficiently supported if growing out of the same circumstances."

In addition to the foregoing, counsel for the plaintiff in error has received numerous letters from lawyers and accountants specializing in federal tax matters and practicing before the Treasury Department and Bureau of Internal Revenue and United States Board of Tax Appeals, commenting on the decisions of the Circuit Court of Appeals in the instant case and generally expressing the opinion that such decision is wrong and would have the effect of barring the allowance of a large number of meritorious claims of taxpayers for refund, and suggesting the advisibility and importance of an effort to bring the case before this court for review and determination, to the end that the point on which the Circuit Court of Appeals' decision turned might be cleared up and finally and definitely settled.

The Circuit Court of Appeals for the Eighth Circuit is definitely committed to the holding that unless the precise ground for recovery of tax alleged in the petition upon suit was stated in the claim for refund filed with the Commissioner preceding the suit, the court is without jurisdiction to entertain such suit. In the case

of *Redwing Malting Company* v. *Willcuts, Collector,* No. 7242, decided November 5, 1926, and not yet reported, that court uses the following language:

> "It does not appear from the record that any claim under Sub-section (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to bringing this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this Court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the Court upon an entirely different and distinct ground from that presented to the Commissioner."

As already stated, there is no authority for the above holdings of the Circuit Court of Appeals for the Eighth Circuit, other than those decisions themselves. The decisions cite no authority in support of such holding. The statute which provides for and requires the filing of a claim for refund, contains no provision and no indication as to what must or should be stated in such claim for refund. It merely says that taxes erroneously or illegally assessed or collected, or unjustly assessed or excessive in amount shall be refunded, and that no suit for such taxes shall be maintained until *a claim* for refund has been duly filed with the Commissioner of Internal Revenue.

In this connection attention is called to a comparison of the language used in the plaintiff in error's claim for refund and that used in his petition in the suit for the purpose of showing the fineness of the distinction drawn by the Circuit Court of Appeals between what it terms the grounds alleged in the one instrument and those alleged in the other, because of which it holds that the claim for refund is fatally and jurisdictionally defective and insufficient to support the cause of action stated in the petition.

In the petition it is alleged that the corporate stock in question on March 1, 1913, "was of the fair market value of $500.00, a share on said date," and that "the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.85 [$203.71]; per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913" [R. 4]. In the claim for refund it is alleged as error on the part of the Commissioner "that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof, as a basis for determining the gain derived therefrom at liquidation" [R. 57]. It seems that the two statements above quoted clearly relate to the same transaction and clearly present the same question. In each

*These figures are in error. They should be $203.71. See transcript of the record in the trial court, page 43.

case the ground of objection to the Commissioner's action is that he did not take the true and correct March 1, 1913, market value of the corporate stock as a basis for determining the profit realized upon liquidation of the corporation in 1920.

Again, it is alleged in the petition in respect to the amount received by the stockholders of the corporation at liquidation "that the net actual and fair market value of the assets so distributed was $88,408.97," and "that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took * * * $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders" [R. 4]. In the claim for refund it is alleged as error on the part of the Commissioner "that he did not deduct from the capital or surplus of said company, at date of liquidation, the full amount of its outstanding liability" [R. 57].

Surely, the most casual comparison of the language used in these two instruments shows that they relate to the same subject-matter, the same transaction and the same state of facts. Surely it cannot be said that in a suit for recovery of taxes, the plaintiff is bound

to use and may use only the exact language taken *verbatim* from his claim for refund in stating his grounds for recovery. It should be sufficient to meet the requirements of the law as announced by the Court, that the grounds alleged and the language used in the claim for refund should relate to the same subject-matter and the same transaction and the same state of facts substantially as those alleged and relied upon in the petition in suit. Indeed, the only way in which the language of the petition could have been brought in closer conformity to that of the claims for refund would have been to have copied *verbatim* the averments of the claim.

If the law requires precise, literal and verbal conformity of the petition to the claim, then this court should do declare, and let the point be settled. If the law allows any variation in the petition from the claim and the assertion of any new ground for relief, then this court should define by some general rule the extent to which such variation or assertion of a new ground may go, and let the point be settled. And if, where a claim has been filed and no question of its sufficiency in substance has been raised in the trial court, such question can be raised for the first time in an appellate court, then this court should so declare, and let the point be settled.

Third Ground for Writ

This ground presents the question of the correctness of the decision of the Circuit Court of Appeals, assuming that its view of the facts and of the law are both correct. The record in this case shows that the tax in question was paid by the plaintiff in error under protest on the 30th day of October, 1923 [R. 74]. Under the provisions of the revenue laws (Rev. Stat., Sec. 3228, as amended by Sec. 1012, Revenue Act of 1924, Sec. 284 (b), (1), Revenue Act of 1926), he had four years from that date in which to file a claim for refund. This time is not yet expired. Therefore, the plaintiff in error might still file a claim for refund and present therein to the commissioner all and precisely the same grounds for such refund which he has alleged in his petition for recovery of the tax, and if such claim were rejected, could then maintain a new action for the tax in full conformity with the requirements of the decision of the Circuit Court of Appeals in the instant case. But he is now faced with a situation which precludes him from maintaining another suit. The trial court in this case considered his cause of action upon its merits and rendered a judgment against him thereon. This judgment now stands affirmed by the Circuit Court of Appeals. A new action for recovery of the same tax on the same grounds would be met by a plea of a former adjudication. But the Circuit

Court of Appeals has refused to review the judgment of the trial court on the merits of the case, and has affirmed such judgment on what is apparently a jurisdictional ground, which was raised for the first time in that court. Thus the plaintiff in error has had a judgment against him on the merits of his case in the trial court, which, if it stands unreversed, will preclude another suit, and has had that judgment affirmed upon a technical jurisdictional ground, which he could still avoid and remove so as to maintain another suit if the judgment of the trial court did not stand as a bar against him.

If the question on which the Circuit Court of Appeals decided the case had been raised in the trial court, and that court had held that it was without jurisdiction because of the insufficiency of the claim for refund, then the action would have been dismissed by the court for want of jurisdiction, or the plaintiff in error could have voluntarily dismissed it, and then, by filing a new claim for refund, have cured the jurisdictional ground and have brought a new action to which no objection on the grounds of the insufficiency of the claim for refund could have been urged.

For the reason above stated, the plaintiff in error says that the decision of the Circuit Court of Appeals is probably untenable and in conflict with the weight of authority, and is such a departure from the accepted and

usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The situation presented is that the trial court assumed jurisdiction over the entire subject-matter of the action and rendered a judgment upon the merits of the cause of action alleged in the petition, and that the Circuit Court of Appeals holds that the trial court never had any jurisdiction to entertain the suit and that it has no jurisdiction to review the judgment of the trial court upon the merits, and thereupon affirms such judgment upon the merits, notwithstanding its holding that that court never had jurisdiction to render any such judgment. The plaintiff in error says that if the trial court was without jurisdiction to entertain the suit, then the Circuit Court of Appeals should have held that the judgment rendered was void for want of jurisdiction, and have reversed and remanded the case, with directions to the trial court to vacate its judgment and dismiss the action for want of jurisdiction. The present status of the case leaves the plaintiff in error with a judgment against him upon the merits of his cause of action, which is a complete bar to another action upon the same facts and for the same relief sought in that one, and at the same time he is denied his right to have such judgment reviewed because the reviewing court says that the trial court never had jurisdiction of the cause of action adjudicated.

For the reasons set forth in his petition and in this brief in support thereof, the petitioner and plaintiff in error asks that a writ of *certiorari* be granted as prayed for.

Respectfully submitted,

CHARLES H. GARNETT,
Attorney for Petitioner and Plaintiff in Error.

INDEX

SUBJECT	PAGES
Authorities for granting certiorari in addition to those presented in petition	1- 5
No Opinion by District Court	5
Opinion of Circuit Court of Appeals	5-6, 46- 47
Ground of Jurisdiction	6
Pleadings	6- 11
Opening Statements of Attorneys	12- 17
Facts Shown in Evidence	17- 32
Motion for Judgment	32- 33
Findings and Judgment	33- 39
Writ of Error to Circuit Court of Appeals	39
Assignments of Error in Circuit Court of Appeals	39- 40
Proceedings in Circuit Court of Appeals	41- 42
Opinion of Circuit Court of Appeals	42- 47
Assignments of Error in Supreme Court:	
As to Decision of Circuit Court of Appeals	47- 48
As to Judgment of Trial Court	48- 49
Authorities and Argument	50
Assignments of Error Considered:	
First Assignment of Error	50- 56
Second Assignment of Error	57- 68
Third Assignment of Error	69- 73
Fourth Assignment of Error	73- 89
Fifth Assignment of Error	89- 92
Specifications of Error in Trial Court:	
First Specification of Error	93-120
Second Specification of Error	120-122
Third Specification of Error	122-133
Fourth Specification of Error	133-138
Conclusion	138-139

TABLE OF CASES

Coffey v. Exchange Bank, 296 Fed. 807 7
Edwards Hines Yellow Pine, Trustees, v. Martin, 268 U. S. 458 87
Erskine v. Van Arsdale, 15 Wall. 75 76
Eisner v. Macomber, 252 U. S. 189 98
Finn v. United States, 123 U. S. 227 75
Fox v. Edwards, 287 Fed. 669 77
J. Homer Fritch, Inc., v. United States, 248 U. S. 458 76
General Inv. Co. v. Lakeshore & M. S. Ry. Co., 260 U. S. 261 79
Gnerich v. Rutter, 265 U. S. 388 ..... 5, 92
Appeal of Gutterman Strauss Co., 1 B. T. A. 243 63
Lee v. Chespeake & O. Ry. Co., 260 U. S. 653 79
Lynch v. Hornby, 247 U. S. 339 112
Lynch v. Turrish, 247 U. S. 221 112
Marr v. United States, 268 U. S. 536 109
Meyer v. W. R. Grace & Co., 290 Fed. 785 87
Morrill v. Jones, 106 U. S. 466 86
Panama R. Co. v. Johnston, 264 U. S. 375 79
Patton v. Brady, 184 U. S. 608 76
Peabody v. Eisner, 247 U. S. 347 114
Rand v. United States, 249 U. S. 503 77
Redfield v. Bartels, 139 U. S. 694 76
Redwing Malting Co. v. Willcuts, 15F (2nd) 626 91
Rock Island R. R. Co. v. United States, 254 U. S. 227 74
Rockefeller v. U. S., 257 U. S. 176 106
Sage v. United States, 250 U. S. 33 78
Sanger v. Nightingale, 122 U. S. 176 78
Smietanka v. Indiana Steel Co., 257 U. S. 1 76
Union & New Haven Trust Co. v. Eaton, —F (2nd) — 2
United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28 75
United States v. Haar, 19F (2nd) 309 67
United States v. Hvoslef, 237 U. S. 1 77
United States v. Phellis, 257 U. S. 156 102
Walker v. Gulf & I. Ry. Co., 269 Fed. 885 85
Warner Valley Stock Co. v. Smith, 165 U. S. 28 ..... 5, 92
Webster v. Fall, 266 U. S. 507 ..... 4, 92

NO. 167

In the Supreme Court of the United States

October Term, 1927

W. C. TUCKER,
Petitioner,

vs.

ACEL C. ALEXANDER,
Collector of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

A writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit was granted herein on March 7, 1927, — U. S. —, 71 L. Ed. 541.

AS TO THE GRANTING OF THE WRIT

In the petition for certiorari three grounds or reasons for granting the writ were assigned.

The first was that the decision by the Circuit Court

of Appeals in this case was in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891 (Petition, p. 19). Since the granting of the writ the decision by the Circuit Court of Appeals in this case has come in conflict with, and has been expressly repudiated as authority by a decision by the District Court for Connecticut in the Second Circuit rendered by Judge Edwin S. Thomas in the case of *Union & New Haven Trust Co.* v. *Eaton,* decided June 2, 1927, — F. (2nd) —. In the opinion in that case, Judge Thomas says:

> "But it is urged that the specified ground for a refund of this amount was not urged in the plaintiff's claim for refund, and that the plaintiff is, therefore, precluded from setting up this ground in this action. I am unable to draw any such conclusion from a study of the statute. Obviously the statute required nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue. In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that whether claimant assigned grounds or not, the statute merely requires that he *file his claim* for refund. To hold, therefore, that a plaintiff is precluded from asserting a reason for refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress. To assert that Congress has the power to impose any condition it sees fit to the grant of a right to sue the sovereign is true enough, but also irrelevant. The

question here is—what is the condition that Congress has actually imposed? The defendant cites and relies upon *Tucker* v. *Alexander,* 15 Fed (2d) 356, and *Red Wing Malting Co.* v. *Willcuts,* 15 Fed (2d) 626, both decided in the Circuit Court of Appeals for the Eighth Circuit. If these decisions interpreted a statute fixing a rate, or determining a duty of a collector, I should, in the absence of any decisions in this Circuit, feel myself constrained to follow them, regardless of my personal views. But a conflict of opinion in the instant case could not constitute a source of embarrassment to administration officials entrusted with the enforcement of the revenue laws. With due deference, therefore, to the judgment of that Court, I find myself unable to accept its conclusions—the more so, as that Court has failed in either case to quote the specific phraseology in the statute upon which it relies."

The conflict indicated between the holding of the Circuit Court of Appeals for the Eighth Circuit and the District Court for Connecticut in the Second Circuit tends to support the action of this Court in granting the writ of certiorari in the instant case, and emphasizes the importance of a decision by this Court which will settle the conflicting decisions of the various inferior federal courts and put the disputed question at rest.

The third ground or reason urged in the petition for certiorari herein was that the decision of the Circuit Court of Appeals decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and departed so far from the

accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Petition, pp. 24-25).

In support of this ground, it was urged by the petitioner that, although the district court had assumed full jurisdiction and tried the case out upon its merits and rendered a judgment against the petitioner thereon, yet the Circuit Court of Appeals held that, because the petitioner's claim for refund of tax filed with the Commissioner of Internal Revenue as a condition precedent to the right to maintain the action was defective and insufficient, the trial court never had jurisdiction to try the cause and render a judgment upon the merits, and for that reason and solely upon that ground, affirmed the judgment as rendered. In other words, the judgment rendered was affirmed on the very ground of want of jurisdiction to render any such judgment.

In the petition for certiorari, no authorities were cited upon this point. Since the granting of the writ the petitioner's attention has been called to the case of *Webster* v. *Fall*, 266 U. S. 507, 69 L. ed. 411, where a similar situation was presented. In that case the trial court heard the case and dismissed the complainant's bill for want of equity and on the merits. On appeal it was held by this Court that because the Secretary of the Interior was not a party to the action in the trial court and was a

necessary party to the determination of the issues therein, the trial court was without jurisdiction to hear the cause and render a judgment on the merits, but should have dismissed the bill for want of a necessary party. Accordingly, it was ordered that the decree of the trial court *dismissing the bill for want of equity should be reversed with directions to dismiss it for want of a necessary party.*

In support of its decision this Court cites *Gnerich* v. *Rutter,* 265 U. S. 388, 68 L. ed. 1068, 44 Sup. Ct. Rep. 532, and *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 34, 41 L. ed. 621, 623, 17 Sup. Ct. Rep. 225.

Following the rule in the foregoing cases, if the Circuit Court of Appeals was correct on the law as to the question of jurisdiction of the district court, then its decision should have been that the judgment of the district court be reversed with directions to dismiss the cause for want of jurisdiction. Therefore, the cases cited support the action of this Court in granting the writ of certiorari in this action on the third ground assigned in the petition therefor.

OPINIONS IN THE LOWER COURTS

No opinion was rendered in the trial court other than its findings of fact and judgment (R. 74-79).

The opinion of the Circuit Court of Appeals is re-

ported in 15 F (2d) 356, under the title of *Tucker* v. *Alexander, Collector.*

THE JURISDICTION OF THIS COURT

The jurisdiction of this Court was invoked by petition for a writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, — Stat. —. The writ was granted as petitioned for and the cause is now here for review and determination under said Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified to this Court for review.

STATEMENT OF THE CASE

This was an action at law begun on October 21, 1924, by the petitioner, as plaintiff, against the respondent, as Collector of Internal Revenue for the District of Oklahoma, as defendant, in the District Court of the United States for the Western District of Oklahoma.

PLEADINGS

The petition, omitting the title thereof and exhibits attached thereto, is as follows:

> "(R.2) Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander, Collector of Internal Revenue, the defendant above named, alleges and says:

"(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

"(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Revenue (R. 3) under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten (fol. 4) days after the date thereof a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true and correct copy of which notice and demand is hereto attached, marked Exhibit A, and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 20, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit B, and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

"(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 150 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed *in specie* to its stockholders by a liquidating dividend; that the net (R. 4) actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired, and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and (fol. 5) illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed

*Corrected to $203.71 by a trial amendment allowed by the Court with consent of the defendant (R. 45). By mistake the original figures instead of the amended ones appear in the transcript of the Record.

at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his income tax returns for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation as a deduction from income, but included said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggerated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

"(4) That on the 2nd day of November 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit C, and made a part hereof; and that (R. 5) more than six months have elapsed since the filing of said claim with the said Commissioner and he has not rendered a decision thereon.

"Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84 with interest thereon at the rate of 6 per cent per anum from the 30th day of October, 1923, and the costs of the action."

Exhibit C to the peteition (R. 6-7), being the claim for refund referred to, was made upon the printed form prescribed and provided for that purpose under regulations established by the Secretary of the Treasury pursuant to law and contained the following statement of the grounds upon which the claimant believed the refund of tax should be allowed:

> "That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT:PA:Fr-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment."

That part of the petitioner's appeal to the Commissioner which is expressly referred to above and adopted as a part of his claim for refund is in the following lan-

guage, taken from a letter of the Commissioner to the petitioner under date of April 24, 1925, and introduced in evidence as plaintiff's Exhibit 5 (R. 54-55):

> "(R. 54) The proposed assessment of additional tax is based upon a revenue agent's report under date of June 5, 1922, and transmitted under date of June 17, 1922. In that report the revenue agent has charged the taxpayer with a profit derived from the liquidation of the Osage Mercantile Company in 1920 in the sum of $19,230.84. This amount is set up as additional income and the larger part of the proposed additional tax rests upon this item.
>
> "The taxpayer says that said revenue agent's report is erroneous, (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis (R. 55) for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation the full amount of its outstanding liability, and (3) in that he did not take into account in reduction of the value of the assets of said company at liquidation its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the revenue agent's report."

On February 9, 1925, the defendant filed his answer of general denial to the petition in the following language:

> "(R. 6) Comes now the defendant above named and for answer to the petition of the plaintiff herein denies each and every allegation therein contained."

The cause was tried in June, 1925, before the Court

without a jury, the parties having waived a trial by jury by a stipulation in writing filed in the cause.

OPENING STATEMENT OF ATTORNEYS

The issues and the facts in the case are fairly stated in the opening statements of counsel. Mr. Floyd F. Toomey, for the defendant, by consent, made his opening statement first as follows:

> "(R. 7) This is a case where the Osage Mercantile Company, a corporation at Pawhuska, was organized in 1902. The plaintiff in this case is a stockholder, and he was, I think, from the beginning of that corporation to its liquidation in 1920, and the tax involved here is an individual tax of a stockholder in the Osage Mercantile corporation. The corporation continued in existence until 1920, at which time it dissolved and liquidated, and the assets of the corporation—I might say from 1914 on I believe the Osage Mercantile Company was owned by two stockholders, W. C. Tucker, the plaintiff in this case, and his brother. In 1920 they dissolved the corporation, and W. C. Tucker and his brother continued business as a partnership, the Osage Mercantile Company, continued it at the same place, same (R. 8) business and under the same name and same management. The tax question arises in this way: It is the determination of the taxable income received by W. C. Tucker, one of the stockholders of this corporation, by having received his partnership share of the liquidated assets of this corporation. The case really arises I think under Section 201 and subdivision (c) of the Revenue Act of 1918, which provides (fol. 12) that amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares and shall be taxed

to the distributee the same as other gains or profits. Now that section of the law simply throws it over into the general proposition, that is, where a taxpayer had assets prior to March 1, 1913, the effective date of the 16th Amendment, which he sells or converts subsequent to March 1, 1913, the taxable gain is the difference between the value of the property on those two dates, so in this case the disputed question involved is: What is the net taxable income of W. C. Tucker arising out of his receiving his proportionate share of the liquidated assets of the Osage Mercantile Company in 1920? And to arrive at that we have to arrive at it as of March 1, 1913, the value of those assets, and subtract that from the value of those assets at the date of liquidation in 1920. Now, that is very simple, but the legal question in this case, the big legal question, is the proper means of arriving at that March 1, 1913, value, and the evidence will be something like this, in order to get the controversy clearly before the court. On March 1, 1913, the assets of this Osage Mercantile Company or corporation were divided really into two corporations, or parts. There was a mercantile business proper and real estate. I think the evidence will show the value of these two parts of the business were about equal. On May 8, 1913, three months later, they take out of the business and take away from this Osage Mercantile corporation all of its real estate and transfer it to a newly formed corporation. I think it was done in order to comply with the Oklahoma laws prohibiting a mercantile company from holding real estate. Now, in arriving at the March 1 value of the assets of this corporation, we have deducted the value of this real estate feature of the business which was taken away from the corporation, and that is practically the only legal question in (R. 9) this case, viz., whether or not in arriving at the March 1 value of this corporation's assets, the Government proceeded properly in de-

ducting from that value [the value] of the real estate which was taken away from the corporation three months later. This real estate was transferred over and they called it the Mercantile Real Estate Corporation. This continued in existence and is in existence today, owned by the same stockholders in the same proportion to their holdings in the Osage Mercantile Company. The mercantile company liquidated in 1920, but the real estate company continued in existence, so what they did was to liquidate just the mercantile feature of the business, and they are seeking (fol. 13) in determining the taxable gain to be derived from that liquidation to take away from it [the assets liquidated] the real estate of the mercantile company as of March 1, 1913, which we contend would be allowing them a double deduction. It would be allowing them to take out in 1920 something of the business which they still have. That, roughly speaking, is our position."

Thereupon counsel for the plaintiff made his opening statement as follows:

"(R. 9) The statements of Mr. Toomey, I think, are in the main correctly made, but there are a few matters he is in error on. In the first place, in 1913, the stockholders were some seven or eight in number, Mr. Ferguson, Mr. Hutchins, Mr. Mosier, Mr. Mathews, and the Messrs. Tucker, two of them. Mr. Mosier's stock was disposed of in 1914. The other stockholders held their shares until 1920. It never passed into the entire ownership of Messrs. Tucker until in 1920. The real estate in 1913 was just a little more than one-third of the value of the assets of the corporation as shown on their books. It was perhaps two-fifths of it as shown on their books. Now, about May in 1913 this real estate was distributed in the form of a dividend, the facts being that it was transferred to another corporation known as the

Mercantile Real Estate Company and charged off the books of the Osage Mercantile Company as a dividend to stockholders. The stock in the (R. 10) Mercantile Real Estate Company was issued to the stockholders of the Osage Mercantile Company in the same proportion as their stockholdings in the latter company. I think the Mercantile Real Estate Company is still in existence, perhaps, with some changes in stock ownership; at least one of the stockholders died. Now, it is the contention of the plaintiff that this distribution of real estate was a dividend at that time and declared out of accumulations prior to March 1, 1913. There were also some cash dividends declared in the early part of 1913 out of earnings prior to March 1 of that year. They amount to a little over $5,000, about $5,800. There was $9,000 in dividends declared up to May of that year, but part of that, or about half of it, was paid out of current earnings, and the amount as set up in the revenue agent's report on which additional tax was assessed is about $5,800 paid out of the previous earnings. Now the tax involved here is an (fol. 14) additional assessment that was paid in the fall of 1923 in the sum of $8,610.84. The evidence will show the taxpayer, Mr. Tucker, in making his return in 1921, showed his income as he claimed it exclusive of any profit in the liquidation of the Osage Mercantile Company. The Collector on his return stated that the tax was erroneously calculated, in that the earnings of the partnership were listed as dividends of a corporation and were not subjected to the normal tax of 8 per cent. If they had been dividends, they would not have been subject to this tax, but being earnings in a partnership, as the facts were, they were subject to the tax. That made an additional tax liability of $1,968.71. The tax shown and paid on his return was $5,172.93, so that his true tax liability on his return was $7,141.63. The total tax payments, the first assessment and the additional assessment aggregated $13,783.76, and deducting the

admitted tax liability of plaintiff from that, makes $6,642.13, which is the amount in controversy here. That is the maximum amount of recovery with interest from date of payment, which is October 30, 1923. Now the claim for abatement and refund was duly filed, and after this suit was filed in April of this year, the Commissioner wrote a letter to the taxpayer, stating he was allowed a refund of $216 and some cents, and we take it that is the minimum of recovery which the taxpayer is entitled to.

"(R. 11) In regard to the amounts distributed in the dividends [in 1913], it is the contention of the plaintiff that those dividends cannot be used to reduce the March 1 value of the stock. They cannot be treated as liquidating dividends, the corporation continuing in business, the same officers at the same place and continuing a profitable business down to July, 1920. If on the other hand, as stated by counsel—this indicates to me a new angle in the case—I had not known of that position until counsel stated it—if it is to be considered that this real estate was not actually a dividend, only just a transfer of the property to the same persons in another form, to form another corporation, and they are deemed as still holding it, then in that event it cannot be taken into account as having been realized upon, and they cannot be charged with having received the value of that real estate in the liquidation of the March 1 value of the stock, so I take it on either view of the nature of that real estate distribution that the proposition of law we contend for would be the same, viz., that that was not a realization at all of March 1 value.

"The remaining question will be as to good will. This corporation earned quite large profits in proportion to (fol. 15) its capital. Organized in 1902, it started with $15,000 capital in 1902. In 1906 that was increased by a stock dividend to $30,000.00, a hundred per cent dividend being declared, and its

[annual] earnings from the period of its organization to March 1, 1913, on a capital of $30,000.00 for the entire period would exceed 50 per cent, taking into account appreciation in value of the real estate. It is claimed it had a good will value then and that it had a good will value at the time of liquidation. The evidence may show those good will values were substantially the same, but it will be contended for the plaintiff that good will is not an asset that can be distributed to stockholders in liquidation of a corporation and they made chargeable with the value of it—that when a corporation liquidates its good will may not be sub-divided among its several stockholders, whether they be two or more, and be treated as having been received by them in liquidation. This was a liquidation and distribution in kind. The assets were not sold, but were taken over by the stockholders, consisting of merchandise, furniture and fixtures and so forth, and not converted into cash and distributed, but it was distributed *in specie* or in kind. I think that covers the plaintiff's contention."

FACTS SHOWN IN EVIDENCE

Thereupon the evidence for both parties was introduced and heard. There was no controverted question of fact developed on the trial. The facts disclosed by the evidence may here be stated briefly in narrative form.

In the year 1902 a corporation known as the Osage Mercantile Company was organized with a capital stock of $15,000,00 to engage in the mercantile business at Pawhuska, in Osage County, Oklahoma. In 1906 a stock dividend of 100% was declared from earned surplus. This gave it a capital stock of $30,000, divided into 300 shares

of $100.00 each which was never increased. Prior to March 1, 1913, petitioner became the owner of 150 shares of its stock. These he owned continuously to July 20, 1920, at which time the corporation was liquidated and dissolved.. He and his brother, R. W. Tucker, at that time owned all of the capital stock, each owning 150 shares. The petitioner made return of his income for taxation for 1920 under the Revenue Act of 1918. He computed the tax due on the income shown on his return and paid the same in the sum of $5,172.92, but he afterward learned that because of an error in computation, this sum was $1,968.71 too small (R. 48).

Thereafter a revenue agent in the field service of the Department of Internal Revenue made an investigation of his income tax liability for 1920 and reported him for an additional tax of $8,610.84. This additional tax was assessed, and on October 30, 1923, after notice and demand by the respondent was paid under protest. On November 2, 1923, he filed with the Commissioner of Internal Revenue a claim for refund of additional tax paid. This claim was held without action on the part of the Commissioner until April 24, 1925, when it was allowed for the sum of $216.26 only, and rejected for the balance. The amount of refund so allowed was not paid (R. 55). On October 21, 1924, the petitioner commenced this action against the respondent as Collector to re-

cover the said sum of $8,610.84 additional tax paid. Issues were joined on February 9, 1925, by the filing of a general denial by the respondent and trial was had on June 12 and 13, 1925. On the trial the petitioner admitted that he had made an error on his tax return in the computations of his tax by reason of which the amount of tax originally paid was too small in the sum of $1,968.71, and that, therefore, that amount of the additional assessment was correctly and justly assessed and collected (R.48), leaving the amount in controversy, which he sought to recover, only the sum of $6,642.14, with interest (R. 55-56, 64).

The additional tax assessed and in controversy was based on an alleged gain or profit realized by petitioner from his corporate stock in the Osage Mercantile Company upon its liquidation in 1920 over its fair market value on March 1, 1913. The Commissioner claims, the petitioner agrees, and the trial court found that the fair market value of the stock on March 1, 1913, based on its book value or the value of the tangible assets of the corporation, was $356.86 a share. Thus the corporation then had an earned surplus of $256.86 a share, or a gross sum of $77,058.00

This value did not include any good will or going concern value attaching to the corporation's business.

A substantial part of its assets at that date consisted of real estate in the City of Pawhuska, Oklahoma, the bulk of which was acquired in 1906 at what was known as the Government Town Lot Sale. The cost of the real estate was $50,150.00 and it was still carried on the corporation's books at that figure, notwithstanding it had increased largely in value since its purchase. There was mortgage indebdness against it of $10.000.00 for part of its purchase price, leaving its net book value $40,150.00.

After March 1, 1913, and shortly prior to May 13, 1913, the stockholders of the company, acting apparently on the belief that the laws of the State of Oklahoma prohibited a mercantile corporation from owning and holding real estate, formed a new corporation known as the Mercantile Real Estate Company with a capital stock of $15,000.00. All of the stock in the new corporation was subscribed for by the stockholders of the old one in the same proporation as their stockholdigs therein. Each subscriber issued his personal check to the new corporation for the amount of stock subscribed for by him. These checks totaled $15,000,00. The new corporation thereupon paid over this $15,000.00 to the old corporation in consideration for the transfer by the old to the new of all the real estate of the old, subject to the mortgage indebedness of $10,000.00 thereon, which the new assumed. Thereupon the old corporation declared and paid by

checks a dividend which included this $15,000.00 received for its real estate.

There was some confusion in the minds of the three stockholders in both companies who testified at the trial as to just how the transaction of the transfer of the real estate from the old corporation to the new was handled. Mr. R. W. Tucker first testified that dividend checks of the Osage Mercantile Company for $15,000.00 were issued to its stockholders, and they then turned these checks to the Mercantile Real Estate Company in payment for its stock and it then turned them to the Osage Mercantile Company in payment for the real estate(R. 37-38). On cross examination he stated that the subscribers to the stock of the Mercantile Real Estate Company gave their checks to it and then it turned these checks to the Osage Mercantile Company for the real estate and then the Osage Mercantile Company paid the amount back to its stockholders in the form of dividend checks (R. 38-39).

Mr. G. W. Hutchins stated that it was a stock dividend, as he understood it, that is, that the stockholders got their stock in the new corporation as a dividend from the old one. His recollection was that the stock in the new was transferred to the old in exchange for the real estate, and was then distributed by the latter to the stockholders. He did not remember whether checks were

issued or not, but knew that he got his stock in the new corporation without the payment of any money and took it as a dividend from the old one (R. 40-41).

The petitioner testified first that the real estate was deeded by the old corporation to the new and the value thereof charged to undivided profits, the same as other dividends, and credited to the real estate account, and that the stockholders in the old corporation received stock in the new in the same proportion as their stockholdings in the old (R. 15-16). Again he stated the transaction was simply that the real estate was deeded to the Mercantile Real Estate Company and its stock was issued to the stockholders (R. 23-24). Later in his testimony, upon examination of the books and records of the Osage Mercantile Company, he testified that the stated consideration paid by the new corporation to the old was $25,000.00, of which $15,000.00 was paid by check and $10,000.00 by assuming the indebtedness of that amount on the real estate. The $15,000.00 thus received by the old corporation was placed with $3,000.00 of other funds, and this $18,000.00 was paid out to its stockholders in a dividend. The remaining balance of $25,150.00 in the real estate account was charged to undivided profits as a loss (R. 59-64).

Mr. S. O. Dye, the Revenue Inspector who made the

investigation and report upon which the tax in controversy was assessed, testifying for the respondent, stated that, while the books of the old corporation showed the transfer of the real estate as a sale, he considered it a gift from the old corporaiton to the new, because it was conveyed at $25,150.00 less than its book value, which was less than its actual value, and this sum was charged off as a loss, and because the stockholders in the new corporation owned the stock in the same proportion as they owned the stock in the old, and because the two corporations later made a consolidated return and claimed a paid in surplus for the new one. He gave his opinion that the transfer of the real estate was not a dividend (R. 67-69).

The finding of the court was that the stockholders in the new corporation paid it their checks for its stock, and that it then paid over the amount of these checks in the sum of $15,000.00 to the old corporation in payment for the real estate, and that the old corporation then declared a dividend of the same $15,000.00 back to its stockholders (R. 76).

After the transfer of the real estate the old corporation continued its mercantile business just as the same had therefore been conducted until its liquidation on July 20, 1920 (R. 17-18). The new corporation was still in

existence at the time of the trial and still owned all, or nearly all, the real estate in question, and the petitioner still owned all the stock in it which he acquired at its organization in the manner above stated (R. 46).

During the period between March 1, 1913, and May 14, 1913, the Osage Mercantile Company declared and paid cash dividends out of its surplus or accumulated profits at March 1, 1913, in the sum of $5,796.53 (R. 15-16). The total cash dividends paid during this period, excluding the real estate transaction from consideration entirely, was $9,000.00, but all of that sum in excess of $5.796.53 was paid out of earnings subsequent to March 1, 1913. The total amount of surplus or accumulated profits on hand at March 1, 1913, distributed in dividends and by conveyance of the real estate was $45,946.53 or $153.15 a share (R. 15-16, 77). This distribution left the corporation with its capital unimpaired and with a surplus of more than 100 per cent, its assets being of the exact value of $203.71 a share.

The petitioner made return of his income for 1913 for taxation under the Revenue Act of 1913, as well as for all subsequent years under that and subsequent Revenue Acts (R. 18).

The Commissioner, in determining the gain realized by the petitioner at liquidation of the corporation, de-

ducted the above sum of $153.15 a share from the March 1, 1913, value of his stock, treating the same as a liquidating dividend received at that time. This deduction reduced the March 1, 1913, value of the stock to $203.71 per share. The amount realized by the petitioner on his stock at liquidation of the corporation in 1920 was $319.46 per share. Then by deducting the reduced March 1, 1913, value of $203.71 per share from the above amount realized in liquidation, a profit or gain of $115.75 a share was shown. Upon this profit per share on 150 shares the additional tax in controversy was assessed by the Commissioner. The $216.26 of refund shown to be due by the Commissioner's letter of April 24, 1925, resulted from the fact that the Revenue Inspector in his report upon which the Commissioner made the assessment, had through error not allowed a sufficient deduction from the assets of the corporation distributed at liquidation in 1920 to cover its outstanding tax liability, both Federal and State, then unpaid and undetermined. When the amount of this outstanding tax liability was finally determined, it was found to be larger than the allowance therefor in the Revenue Agent's report (R. 19, 22). This tax had to be and was paid by stockholders out of the assets of the corporation received at liquidation (R. 18). Payment of it reduced the alleged gain of the petitioner on his stock at liquidation and thereby made the amount of

the additional assessment against him excessive by $216.-26, according to the Commissioner's own theory and figures (R. 55).

The court approved and adopted the theory and method of the Commissioner in determining the petitioner's gain on his stock and held that the additional tax in controversy was rightly assessed and collected, except as to the $216.26 of refund admitted to be due. As to this refund, however, he declined to give the plaintiff judgment. The reason assigned was that the claim for that amount had been allowed and would be paid in due course by a Treasury check. Judgment was accordingly rendered for the defendant for costs, without prejudice to the plaintiff's right to receive the refund of $216.26 (R. 78).

At liquidation of the Osage Mercantile Company, the petitioner and his brother, R. W. Tucker, owned all its stock, each owning one-half. The assets of the corporation were not sold, but were distributed *in specie* or in kind in a liquidating dividend to the two stockholders, each receiving one-half of them. Then they formed a partnership and put the former assets of the corporation, which consisted of furniture and fixtures, merchandise, accounts. etc., into the partnership for its capital and continued to conduct the same kind of business at the

same location under the name of the Osage Mercantile Company, a partnership. They did not acquire the ground and building in which the business was located and which the corporation owned at March 1, 1913, because that had been transferred in the real estate transaction in May, 1913, to the Mercantile Real Estate Company.

The evidence conclusively showed that stock in the Osage Mercantile Company had a good will value of at least $100.00 a share on March 1, 1913. Five witnesses, including the petitioner, testified to this or a higher value at time. The evidence also fairly shows that substantially the same good will value attached to the stock at liquidation of the corporation in 1920, although several of the witnesses were of the opinion that it was less than in 1913 (R. 20-21, 25, 32, 35, 36, 42).

The court declined to make a finding of the value of the good will at March 1, 1913, or at July 20, 1920, but found that whatever good will the corporation had on March 1, 1913, it also had on July 20, 1920, and that the same inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the partnership enterprise and was enjoyed by the partners, who were the sole owners of the corporation's stock at dissolution, and further found that whatever good will value attached to the stock on

March 1, 1913, likewise attached to it on July 20, 1920, and, therefore, if existent, would not in any way affect the taxable gain derived by the petitioner upon liquidation of the corporation (R. 77-78).

During the trial counsel for petitioner asked leave to amend the petition by changing the figures which it was alleged the Commissioner erroneously, wrongfully and illegally assumed and took as the fair market value per share of the petitioner's stock on March 1, 1913, from "$356.86" to "$203.71." Counsel stated that he had intended to ask leave to make such amendment before the trial started, but overlooking doing so. Counsel for the respondent stated he had no objection to the amendment. Thereupon the court made the following ruling.

> "(R. 45) By the Court: You can make the amendment. It is a mistake of what valuation the Commissioner put on the stock at that date."

But the amendment figures do not appear in the petition as set out in the Record. Either there was a failure to make the actual physical change of the figures in the original petition after the amendment was allowed, or by mistake the original unchanged figures were used in transcribing the petition for the Record. Counsel for the petitioner did not discover that the amended figures did not appear in the petition as set out in the Record until after the decision by the Circuit Court of Appeals.

It is assumed that since the trial court expressly allowed the amendment and the case proceeded on the theory that it had actually been made, this court will consider it as actually made. There is no controversy over the fact that the Commissioner took the actual March 1, 1913, book value of the stock, which was agreed to be $356.86 a share, and reduced this value to $203.71 a share by deducting dividends declared and real estate distributed between March 1, 1913, and May 14, 1913, out of surplus existing at March 1, 1913, and then took this reduced value of $203.71 a share from the amount realized per share by the petitioner at liquidation in 1920 to measure his gain per share in the latter year. The correctness of this is what the petitioner challenges.

The petitioner put in evidence as Exhibit 4, without objection, a carbon duplicate, executed on the prescribed printed form, of the claim for refund which he filed with the Commissioner prior to suit (R. 51-53). He also put in evidence as Exhibit 5 the letter received by him from the Commissioner allowing his claim to the amount of $216.26 and rejecting it for the balance (R. 54-55).

No question of the sufficiency, either in form or substance, of the claim for refund as a basis for the recovery of the tax upon the grounds alleged in the petition and shown by the evidence, was raised by the re-

spondent. Objection that the grounds for refund stated in the claim did not conform to the petitioner's cause of action as set forth in his petition, or as disclosed by the evidence upon the trial, was not raised, considered or decided by the trial court. Proof of filing of the claim was made by the petitioner as a mere formal matter to show that it had in fact been filed with, and held without action by the Commissioner more than six months prior to the commencement of the suit, in order to meet the requirement of the statute in that regard. Both parties and the court assumed, without question, discussion or consideration, that the claim for refund was legally sufficient, and that the case was to be heard and decided upon the issue of whether the tax in dispute was rightfully and legally exacted from the petitioner, or was wrongfully and illegally exacted from him.

The only question presented was as to the determination of the true March 1st value of the petitioner's stock, which was to be taken as the cost thereof to him, and deducted from the amount which he received upon liquidation of the corporation in 1920, taken as the sale price thereof, to measure his gain, if any, in that year. Nor was there any dispute as to the actual value of the stock on March 1, 1913, disregarding for the moment the question of good will value, nor any dispute as to the

value of the property consisting of money and real estate distributed to the stockholders of the Osage Mercantile Company in May, 1913, out of surplus accumulated prior to March 1, 1913. The sole question presented in this particular was one of law as to whether or not this distribution from March 1, 1913, surplus should be deducted from the March 1, 1913, value of the stock before such value was deducted from the amount realized by the petitioner on his stock in 1920, to determine the resulting gain to him upon such realization, or should be regarded merely as a current dividend from earnings, just as the many other dividends during the years from 1913 to 1920 were regarded, and as not affecting the March 1, 1913, value as cost of the stock for the purpose of determining gain realized in 1920.

That this is true is clearly shown by the following stipulation made by counsel for the parties upon the trial:

> "(R. 64) Mr. Toomey: I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out, based upon the net worth of the corporation was $356.86 per share. That is the figures used by the Revenue Agent. It is also agreed that if the Government is correct in reducing that March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced

$153.15, leaving a net March first value per share of $203.71. I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share. That if the Court should hold that the Government is wrong in its method of computing the March first, 1913 value, hold we are wrong entirely, that the plaintiff is entitled to judgment for $6,642.13, the maximum amount of the recovery will be only $6,642.13. The correct means of treating the $216.26 will be reserved for the determination of the Court.

"Mr. Garnett: It is understood that if the Government is wrong as counsel has stated as to the handling of the dividends the amount refunded of taxes will be $6,642.13.

"Mr Toomey: Yes, sir.

"(R. 65) Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the tax-payer is entitled to will not be included in the judgment, then that would be deducted from the total amount so refunded.

"The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on good will value shown to have existed March first, 1913, and also existed at July, 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation."

MOTIONS FOR JUDGMENT

At the conclusion of the evidence the petitioner filed his motion in writing for judgment in his favor in the following language:

"(R. 73) Comes now the plaintiff above named at the conclusion of all the evidence in the case and moves and asks the court to render judgment in his favor upon the evidence in the case and the law applicable thereto, for the sum of $6,642.13, with interest thereon at the rate of 6% per (R. 74) annum from October 30, 1923, or the total sum at this date of $7,289.73 and for the costs of this action."

The respondent filed his motion in writing for the dismissal of the plaintiff's petition and for costs (R. 74).

FINDINGS AND JUDGMENT

Thereupon, the Court overruled the petitioner's motion and sustained the respondent's motion and made his findings and judgment in the form of a journal entry which was duly entered in the cause (R. 74-79). This judgment is as follows:

JUDGMENT OF THE COURT

"(R. 74) This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May 1925 Term of the above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A. Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the (R. 75) close of the day, court re-

cessed and the trial of the cause was continued to 9:00 o'clock a. m. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

"Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with interest thereon at the rate of six per centum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

"Thereupon the cause was argued to the court, and the court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63, and that of the additional tax assessed against

him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assesesment to have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March (R. 76) 1, 1913, and which he realized upon in liquidation of said corporation on July 20, 1920; that the assets of the corporation were not sold at liquidation, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a co-partnership, the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913, the assets of said corporation consisted of the mercantile business proper, including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation known as the Mercantile Real Estate Company, with a capital stock of $15,000.00 was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholdings in the old corporation; that said stock-

holders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence, and the plaintiff still owns the stock which he acquired in it at its organization as above stated; that during the period between (R. 77) March 1, 1913, and May 14, 1914, the Osage Mercantile Company declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of the real estate so transferred to the Mercantile Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividends to the extent of $5,796.53, distributed between March 1, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was as-

sessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

"The court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913, value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that therefore, the additional tax assessed by the Commissioner of Internal Revenue, with the exception of the sum of $216.26, above referred to, was properly and legally assessed, collected and paid.

"The court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913, was also enjoyed by the company at the time of its dissolution on (R. 78) July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; that any good will value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

"The court, therefore, finds the issues generally for the defendant, and further finds that since the

Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

"The court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the plaintiff at the time excepted and his exception is allowed.

"It is therefore, considered, ordered and adjudged by the court that the motion of the plaintiff herein for judgment in his favor be, and it is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and it is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and adjudged (R. 79) against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed by the Commissioner of Internal Rev-

enue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

"Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty days from this date in which to make, serve and file his bill of exceptions herein."

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS

Thereafter such steps were taken and proceedings had by the petitioner that the cause was brought by writ of error before the United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, in the State of Missouri. In said Court the plaintiff in error therein, plaintiff below and petitioner here, made the following assignments of error occurring in the trial court.

ASSIGNMENTS OF ERROR.

"(R. 80) 1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for a judgment in his favor made at the conclusion of the evidence on the trial.

"2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below, for a judgment in his favor made at the conclusion of the evidence on the trial.

"3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in

refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of said corporation on July 30, 1920.

"4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

"5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

"6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest (R. 81) thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

"7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six per centum per annum from October 30th, 1923, and for costs of the action.

"8. The court erred in rendering judgment for the defendant in error for costs.

"9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

"10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

"11. The court erred in that its judgment is contrary to law."

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

The cause was duly briefed, argued and submitted for decision in the Circuit Court of Appeals, and on October 27, 1926, that Court rendered its decision affirming the judgment of the trial court. In its decision the Circuit Court of Appeals did not consider any of the assignments of error made by the petitioner but considered only the question, raised for the first time in the respondent's brief in that court, of the conformity of the grounds for refund of the tax alleged in the petitioner's claim for refund to those alleged for its recovery in his petition in the suit and as disclosed by the evidence. This question had never been raised in, nor called to the attention of, nor considered by, the trial court, and no action of the trial court upon such question is disclosed by the record. Upon this question the Circuit Court of Appeals held that an action for recovery of income tax could not be based on any ground other than those presented in the claim for refund filed with the Commissioner as a condition precedent to the right to maintain the suit, and further held that in the instant case the grounds relied upon in the petition in the suit were entirely different from those contained in the claim for refund.

While not expressly so stated in the opinion, it is evident that the Circuit Court of Appeals treated the

question of the sufficiency of the claim for refund as a basis and support for the suit as a jurisdictional one, and, therefore, properly raised for the first time in that court, as a court of review.

Having reached the conclusion that the petitioner's claim for refund was insufficient to support his petition in the suit, the court held that the judgment of the trial court against his right to recover the tax was correct and should be affirmed. Accordingly it rendered a judgment affirming the judgment of the trial court (R. 87).

OPINION OF CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals appears at pages 83 to 87 of the Record, and is in full as follows:

> "(R. 83) Stone, Circuit Judge. This is an action for refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the department, thereafter, resulted in an additional assessment, which was paid under protest. (R. 84) In due time after this last payment, plaintiff filed his claim for refund. After waiting 17 months, in vain, for some action thereon by the department, this action was brought. About six months after this action was begun and before trial thereof, the department made an allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant, but without prejudice to acceptance by

plaintiff of the allowance of $216.26, this writ of error is sued out.

"In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

"Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Okla. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a copartnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to the date of liquidation in 1920.

"There are two main contentions here. One is of minor importance, concerning costs herein.

"The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

" 'That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000 divided into 150 shares of the par value of $100 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000 divided into 300

(R. 85) shares of the par value of $100 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders.'

"The collector contends that the plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

*Corrected by trial amendment to $203.71 (see R. 45).

"'The taxpayer says that said revenue agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation, the full (R. 86) amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the revenue agent's report.'

"It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the claim for refund. Hence, the above point raised by the collector must be determined. We think the collector is right for the reasons following:

"This is a suit against the government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Internal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the commis-

sioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

"(R. 87) The minor claim affects only costs and arises out of the fact that the commissioner allowed a refund of $216. The tax was paid, under protest, on October 30, 1923; the claim for refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the statute, six months after the claim was filed within which to determine the claim and within which time plaintiff could not bring suit. As the commissioner did not act within that period, the plaintiff was within his rights in bringing suit. If he had based his suit upon any ground contained in the claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

"The judgment should be and is affirmed."

Motion of the petitioner for a new trial in the Circuit Court of Appeals was filed and overruled (R. 89). Thereupon, petition for a write of certiorari was lodged by the petitioner in this court and on March 7, 1927, the same was granted (— U. S. —, 71 L. Ed. 541), and the cause duly brought before this court for review upon certiorari.

ASSIGNMENTS OF ERROR

As to the Decision of the Circuit Court of Appeals

The petitioner here assigns the following errors in respect of the decision and judgment of the Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in holding that a claim for refund of tax, stating in general terms only the grounds upon which a refund was claimed, was legally insufficient as a claim and would not support a subsequent suit to recover the tax.

2. The said Court erred in holding that the petitioner could not rightfully assert in his petition in the suit, nor base his recovery upon, any ground for repayment of the tax which was different from the grounds asserted in his claim for refund filed with the Commissioner prior to the suit.

3. The said Court erred in holding that the grounds

relied upon in the petition in the instant case were entirely different from those set out and relied upon in the claim for refund.

4. The said Court erred in holding that the sufficiency of the grounds alleged in a claim for refund of tax to constitute a foundation for, and give the right to maintain, a subsequent suit for the recovery of such tax is a jurisdictional question and is not waived by not being raised in the trial court, but may be raised for the first time in a court of review.

5. The said Court erred in holding that, although in the instant case the trial court had no jurisdiction, because the claim for refund was fatally insufficient and defective, to determine from the facts alleged in the petition and shown by the evidence whether the tax in controversy was illegally exacted from the petitioner or not, still that court's judgment that such tax was not illegally exacted should be affirmed on the ground of such lack of jurisdiction.

As to the Judgment of the Trial Court

The assignments of error in respect of the judgment of the trial court, already set forth above, may be grouped and considered under four specifications as follows:

1. The trial court erred in holding as a matter of

law that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.46 paid out of surplus accumulated prior to March 1, 1913, were to be excluded from assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as the cost basis for determining the gain realized by the petitioner upon his stock at liquidation of the latter corporation in 1920.

2. The trial court erred as a matter of law in not rendering judgment for the petitioner for the amount of $6,642.13 with interest thereon at the rate of 6% per annum from October 30, 1923, and the costs of the action.

3. The trial court erred in holding as a matter of law that whatever good will value was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders upon the distribution of its tangible assets to them in kind.

4. The trial court, having refused a judgment for the petitioner for $6,642.13 and interest, erred as a matter of law in not entering judgment for him for at least the sum of $216.26 which the Commissioner by letter admitted to be refundable, with interest at 6% per annum from October 30, 1923, and the costs of the action.

BRIEF AND ARGUMENT

The Decision of the Circuit Court of Appeals

First Assignment of Error

This assignment presents the question of what is required to be stated in a claim for refund in order for it to constitute a valid claim within the meaning of the statute providing that a claim for refund shall be filed before any suit or proceeding shall be maintained for the recovery of any Internal Revenue tax. The applicable statutes in force at the time the petitioner's claim for refund was filed are Secs. 3220 and 3226, Revised Statutes, as amended by Secs. 1315 and 1318, Revenue Act of 1921, as follows:

> (Sec. 3220 as amended) "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected * * *."
>
> (Sec. 3226 as amended) "No suit or proceeding shall be maintained in any court for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pur-

> suance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty or sum."

Under this latter section the Circuit Court of Appeals assumed that a claim for refund that stated the grounds on which the refund was sought in general terms, such as merely that the tax was erroneously and illegally assessed and collected, was not a sufficient compliance with the statute and that such a claim was in legal effect no claim at all and hence afforded no basis for a suit in court to recover the tax.

As to this holding, it will be observed that the statute contains no intimation or requirement as to the contents of the claim. Its language is merely that before a suit can be maintained for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, a "claim for refund" must have been filed with the Commissioner in conformity to the provisions of law and the regulations of the Secretary of the Treasury. There is no other provision of law as to what shall be the form or contents of the claim for refund. The only regulation established by the Secretary of the Treasury in force at the time the petitioner's claim for refund was filed is contained in Art. 1036, Regula-

tions 45, and the pertinent part thereof reads as follows:

> "Claims by the taxpayer for the refund of taxes and penalties erroneously or illegally collected shall be made on Form 46. In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. It should be accompanied by the collector's receipt or the cancelled check showing payment of the tax."

The number of the form prescribed in the regulation quoted was changed from 46 to 843 prior to the filing of the petitioner's claim in November, 1923.

From the foregoing it appears that neither the statute nor the regulations prescribed by the Secretary of the Treasury required the claim for refund to state more than that the tax was erroneously or illegally assessed and collected. The regulation does go further on the subject of proof, but not upon the subject of the statement of the claim. It provides that the burden of proof rests upon the claimant and that the facts relied upon in support of his claim shall be stated under oath, but not that such facts shall be stated and embodied in the claim itself. Ordinarily the phrase, "facts relied upon in support of the claim," would mean the evidence to support the general averments of the claim, and would not mean the facts necessary to be alleged to constitute the claim

itself. This is in accord with the rules of good pleading. It is elementary that a pleader should allege only the general or ultimate facts which constitute his cause of action, and should not plead primary facts which are merely evidence of the general or ultimate facts alleged. At common law the common counts, merely alleging money paid by the plaintiff for defendant's use and money had and received by defendant for plaintiff's use, were a sufficient pleading and stated a good cause of action in assumpsit. 2 Bouv. Law Dict. 369. It is true they were generally coupled with one or more special counts in which the facts were more particularly pleaded, but a declaration containing the common counts was good upon a general demurrer. In respect of a claim for refund it would seem that a statement, in the language of the statute, that it was for a tax erroneously and illegally assessed and collected, would be a legally good and sufficient claim. It might be that it would be of advantage to a claimant for the better consideration of his claim to plead a more detailed statement of the grounds relied on, or that the Commissioner might request that the claim be made more definite and certain by stating particulars, so that he might more intelligently consider it. But if this were not done, it would seem that objection to the claim because couched in general terms was waived. Nor would a detailed statement be needed, or

be of any aid to the Commissioner, where the "facts relied upon in support of the claim" were fully disclosed in the evidence submitted. The burden of proving the averments of his claim rests on the claimant, and he has to present under oath the evidence to support them. He may do this by oral testimony, or by affidavits or depositions, or by documentary evidence, or by any combination of these. In this evidence will be found the particular and primary facts to established the alleged error and illegality in the assessment and collection of the tax. In any event how can a claim, worded in general terms, but in the language of the statute, be held a nullity where no objection to its statement of the grounds for relief is made and it is fully considered by the Commissioner and rejected, not because of any defect in form or statement, but because in his opinion the tax claimed was not erroneously or illegally assessed or collected?

In practice, so far as within the experience of counsel for the petitioner, the filing of claims in general terms with supporting affidavits stating in detail the facts relied on has been favored by the Commissioner. The claim is submitted on a printed form furnished by the Commissioner, a *fac simile* of which appears as Exhibit C to the petition in the instant case (R. 6-7). In this form space of about eight lines is provided for the statement of the reasons why the claimant believes his claim

should be granted. This indicates that the Commissioner intends that the reasons shall be stated briefly and concisely and hence broadly and in general terms.

It will be noted that in the claim here involved (R. 6-7), there is attached and adopted a letter from the Commissioner to the petitioner advising him "that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence." This letter clearly indicates that the statement of the petitioner's contentions in his claim was considered as something entirely separate and distinct from his supporting evidence, but that such contentions were to be passed upon in the light of the supporting evidence.

Attention is also called to the fact that the refund a claimant may be allowed is not limited to the amount stated in his claim, although he is expected there to state the amount which he claims to be refundable. In the detailed statement of facts called for by the Commissioner's printed form, Exhibit C above, at line six the claimant names and asks for a certain number of dollars as the "Amount to be refunded (or such greater amount as is legally refundable)." In this the Commissioner recognizes the fact that if the claimant's proof in support of his claim shows an amount actually refund-

able to him greater than that stated in the claim, he is to receive such greater amount.

Therefore, to say that a claim for refund, in which the amount claimed is stated generally as a certain sum or such larger amount as the claimant may be legally entitled to, and in which the grounds for the claim, stated in the language of the statute, are that the tax was erroneously and illegally assessed and collected, is insufficient and legally a nullity, is to read into the statute a provision which Congress did not see fit to put there, and to put a narrow and strict interpretation upon its provisions, notwithstanding it is a remedial statute and as such is to be liberally construed.

This assignment of error will not be further discussed. If it is well taken, and if a claim for refund of tax stating in general terms the grounds upon which the refund is claimed is legally sufficient under the statute as a claim, then the decision and judgment of the Circuit Court of Appeals must be reversed, and the judgment of the District Court be reviewed upon its merits. But if this Court should be of the opinion that this assignment of error is not well taken, then other assignments must be considered.

SECOND ASSIGNMENT OF ERROR

This assignment presents the question of whether or not a claimant can bring a suit for the recovery of income taxes and assert and rely in his petition upon grounds for recovery not stated in his claim for refund previously filed with the Commissioner. The Circuit Court of Appeals held that in such a suit the plaintiff is limited in the grounds upon which he may recover in the suit to precisely and only the grounds which have been particularly stated in his claim for refund filed with the Commissioner. No authority is cited by the Court to support this holding, and we know of no authority which does support it.

The holding is in fact a limitation and restriction on the general jurisdiction of the District Court over the subject matter of the cause of action. Under the Constitution, Article 3, Section 2, the judicial power of the United States extends among other cases to such as arise under the Constitution, laws and treaties of the United States. It is vested, Article 3, Section 1, in one Supreme Court and in such inferior courts as the Congress may ordain and establish.

Section 24 of the Judicial Code defines the general jurisdiction of the district courts. Its provisions pertinent here are as follows:

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States. * * *"

* * * * * * * * *

"Fifth. Of all cases arising under any law providing for internal revenue * * *."

If a District Court of the United States has any appellate jurisdiction whatever, it is not of cases such as the present one, which clearly comes within its original jurisdiction as defined in the foregoing provisions of the Judicial Code. If the holding of the Circuit Court of Appeals is correct, then the jurisdiction of the District Court in a case such as the present one is of an appellate nature rather than original, for it is limited to the review or retrial of the case upon the pleadings and issues as framed and made up in the office of the Commissioner of Internal Revenue upon the plaintiff's claim for refund, and the Commissioner's rejection thereof, if it has been rejected. It is true that the trial in District Court would be *de novo,* but it would be merely a retrial of the issues, and only the same issues, presented to the Commissioner on the claim for refund. The jurisdiction of the District Court would be like that which a State Dis-

trict Court in Oklahoma has over appeals from a justice of the peace, under which the case is retried on appeal upon the pleadings filed in the justice of the peace court.

The holding of the Circuit Court of Appeals is really that the filing of a claim for refund with the Commissioner is the commencement of an action to recover the tax, and that the claim itself constitutes the claimant's pleading or statement of his cause of action, and that he is thereafter forever bound by the theory and grounds for relief which he asserts in his claim and may not ever thereafter change such theory and grounds or take a new position or assert any new grounds for recovery when he files suit in the District Court. And by the same reasoning, if the claimant is to be bound by the allegations of his claim for refund when he brings suit in court, then the defendant should likewise be bound by the reasons assigned by the Commissioner for rejecting the claim, and the jurisdiction and power of the District Court would be limited to a mere retrial of the issues as framed before the Commissioner upon the claim and the rejection thereof. Surely there is nothing in the statute which would support this position, and it is not indicated in any court decision prior to the one in the instant case. The correctness of such an interpretation of the statute is negatived by the fact that the Commissioner is not required to assign any reason for rejecting a claim, and is

not required to act on it within any fixed time or at all. He might hold it indefinitely. But after six months from the filing of the claim the claimant may bring suit as though it had been rejected. This is what the petitioner did in the instant case. But if the claim is the basis of the action at law to recover the tax, and if the statement of the plaintiff's cause of action upon suit in court for recovery is limited to the grounds stated in his claim for refund and none other, then it would seem that the Commissioner should be required to pass on the claim and state his grounds for rejecting it before suit could be brought, so that the issues for the action in court might be fully made up on both sides through the averments of the claim, as stating the plaintiff's cause of action, and through the reasons for the rejection of the claim by the Commissioner, as stating the defense. This apparently the statute does not require, nor contemplate, nor authorize, and, therefore, the position of the Circuit Court of Appeals appears unsound.

Indeed, the holding of that court, if followed to its logical conclusion, would lead further and would preclude the taxpayer from producing any evidence in support of his action in the District Court in addition to or other than that which he had previously presented to the Commissioner. Because if the Commissioner must have before him all the averments of fact in support of the claim

in order for him to pass upon the merits of it intelligently and correctly, he should also have before him all the evidence which the taxpayer has to support the claim. Otherwise the taxpayer might withhold evidence from the Commissioner, or might discover new evidence after the Commissioner had rejected his claim, which, if it had been presented to the Commissioner, might have required or caused the allowance of the claim and have rendered the suit unnecessary. If this rule obtained, then beyond question any suit brought in the District Court for the recovery of taxes after the rejection of a claim by the Commissioner would be nothing more nor less than an appeal from the Commissioner to that court, and the power and jurisdiction of the court would be limited merely to the review of the correctness of the Commissioner's decision upon the cause of action stated in the claim and the evidence presented by both sides in respect thereto.

The reason assigned by the Circuit Court of Appeals for its holding is that the Commissioner should have before him all the grounds and facts upon which the taxpayer relied for the recovery of the tax, so that he might allow the claim, if it deserved allowance, and thus "spare the parties and the courts the burden of litigation in respect thereto." This reasoning is sound enough as far as it goes, but it does not fit the facts of the supposed situa-

tion. The object of a claim for refund is to recover money which the claimant wants and believes he is entitled to. An action at law is for the same purpose. Obviously no considerable number of citizens would purposely present their claims for refund in such form as to conceal from the Commissioner the real grounds on which they hoped to get the money, or would intentionally withhold from him any evidence which would tend to establish their right to the money, so that he might reject their claims and thus give them a chance to go into court to recover the same thing they would have obtained if the claims had been allowed. Not many people, if they could obtain the desired money through a claim for refund, would prefer to have such claim rejected in order that they might have an opportunity to bring a suit in court, with its incident expense of costs, attorney's fees and time, to get the same money. Such a course would be contrary to all known rules of human conduct. If in the court action any new theory is developed, or any new facts alleged or new evidence produced, it may be safely assumed that these things were overlooked or were not available when the claim was presented to the Commissioner.

The answer to the position taken by the Circuit Court of Appeals on this point is well stated in the decision of Judge Thomas in *Union & New Haven Trust*

Co. v. *Eaton,* which is quoted at length hereinabove at page 2 and need not be repeated here. We ask that the language of that decision be read in connection with this assignment of error.

The United States Board of Tax Appeals was created for the purpose of determining, in a judicial or quasi-judicial proceeding, questions of disputed liability for tax in advance of the assessment of the tax by the Commissioner and the payment of the same by the taxpayer. Section 900, Revenue Act of 1924. By special statutory provision, as well as by the name given the tribunal itself, its function and jurisdiction is to receive and hear an appeal by a taxpayer from the determination by the Commissioner of a deficiency in his tax. Section 274 (a) (b), Revenue Act of 1924. Yet the Board of Tax Appeals has held that its jurisdiction is not limited to a mere review of the rulings made by the Commissioner upon appeal to it, but that it will try the question of the taxpayer's liability *de novo.* In *Appeal of Gutterman Strauss Co.,* 1 B. T. A. 243, it was contended by the Commissioner that the claim advanced by the taxpayer in his appeal to the Board had not been made in proceedings before the Commissioner, and therefore, could not be raised before nor considered by the Board. In passing upon this point the Board said (pp. 244-245):

"But admitting that this claim was not made be-

fore the Commissioner, the Board is clearly of the opinion that it has jurisdiction to determine the point in issue. The Commissioner has found a deficiency in tax for the year 1919. It is the duty of this Board to determine whether the amount found as a deficiency is the correct amount of the deficiency, if any.

"Section 900 of the Revenue Act of 1924, in providing for the creation of this Board, defining its jurisdiction, and outlining methods of procedure to be followed in the determination of appeals coming before it, makes it clear that it is an independent agency in the executive branch of the Government and entirely disconnected in every respect from any other administrative agency or department. It functions under the law as a tribunal before which facts must be proved. It not only finds the facts, but its findings of fact are of record and are *prima facie* evidence in tax proceedings in all courts. The only limitation upon the procedure of the Board is that notice and an opportunity to be heard shall be given to litigants appearing before it. The Commissioner is an ordinary litigant before the board. A case is heard before the Board as a *de novo* proceeding. This is evidenced by the above and further by the Board's power to conduct hearings in accordance with such rules of procedure as it may prescribe and by the fact that there has been given to it powers requisite to a complete examination of all witnesses and documents necessary in the disposition of any case brought before it.

* * * * * * * * *

"This Board was not created for the purpose of *reviewing rulings made by the Commissioner,* but was created for the purpose of *determining the correctness of deficiencies in tax* found by the Commissioner. If the deficiency in tax found by him is greater than the true deficiency, the Board has au-

> thority to decrease it; if it is less than the true deficiency, the Board has authority to increase it (*Appeal of the Hotel DeFrance Co.*, 1 B. T. A. 28). If a taxpayer can prove to this Board that he is entitled to a deduction from gross income, the deduction will be allowed even though it has never been claimed by the taxpayer at any hearing had before the Commissioner; otherwise it would be impossible for this Board to determine the correct amount of the deficiency."

In the instant case the decision of the Circuit Court of Appeals operates to limit the original jurisdiction of the District Court, and makes it in effect a court of appeal or review from the decisions of the Commissioner upon claims for refund, and denies to it that complete original jurisdiction of the subject matter of the cause of action which the Board of Tax Appeals asserts and exercises in the case of an appeal to it from the determination by the Commissioner of a deficiency in the tax of a taxpayer.

Nor can the plaintiff, in an action at law to recover income tax, be denied the right to assert in court a ground for relief not inconsistent with, but merely not brought forward in, his claim for refund on the ground of an estoppel. It is not claimed in this case that the petitioner has taken in the suit a position inconsistent with or conflicting with that taken before the Commissioner. It is claimed merely that he brings forward a new ground for relief, based either upon facts not pre-

viously asserted or upon a conclusion of law not previously involved, in his claim for refund. It would seem that this is hardly a situation where the doctrine of estoppel applies. It is a well settled principle of law that one who relies on estoppel must plead it. In the instant case no estoppel of the petitioner to bring forward in his suit the question of the legal effect of the dividends of cash and real estate from the surplus of the Osage Mercantile Company on March 1, 1913, was pleaded by the respondent. His answer to the petition is a general denial (R. 6).

It may be noted that while the Internal Revenue Department insists that a taxpayer cannot recover in suit a refund of tax on any ground not presented to the Commissioner, yet its attitude is entirely different in respect of the taxpayer's liability. In Treasury Decision 3251, promulgated under date of November 25, 1921, it is said:

> "To Collectors of Internal Revenue and Others Concerned: The validity of an assessment depends upon the law and actual facts existing. Therefore, an assessment made upon an erroneous theory or by mistake may not be remitted or abated because so made if, at the time its validity is passed upon, the Commissioner is in possession of evidence which shows an equivalent amount of tax is properly due in connection with the income, transaction or matter upon which the assessment is predicated."

Thus the Commissioner reserves the right at all times to enforce an assessment of tax, even though made

upon an erroneous theory or a mistake of fact, if it appears that upon some other theory or the discovery of facts not previously known, the taxpayer would owe an equivalent amount of tax. This is precisely the thing that the Circuit Court of Appeals said the taxpayer cannot do when he brings suit in the District Court to recover taxes which he claims were erroneously and illegally assessed and collected. Under that court's holding, even though it be plainly manifest that the tax in controversy was erroneous and illegally assessed and collected, yet if in his claim for refund the taxpayer based liis right upon an erroneous theory, or made a mistake in his facts, he could not recover in the suit.

In the case of *United States* v. *Haar et al.,* 19 F (2d) 399, 404, decided in the District Court for the Southern District of Georgia, the facts were that the Commissioner had made an emergency assessment of tax without the taxpayers having actually filed a return. Thereafter the taxpayers claimed and were allowed an abatement of a large part of the tax. Later the Government brought suit to enforce certain liens for the tax and the defendants raised the question that the entire tax was void because not based on any return. The Government contended that they were estopped to assert that the tax was void, because they had applied for and obtained an abatement of part of it without raising the question of

its invalidity. In passing on that contention the court said:

> "It is urged by the United States that because the defendants sought and obtained abatements from the original assessment without disclosing their contention that the assessment was void in the absence of a return they are now estopped from asserting such contention of invalidity. There is no proof or insistence that the United States has in any way foregone anything or acted to its hurt by reason of such abatements or of the omission to assert more promptly the attack upon the validity of the assessments. The essence of estoppel is action or inaction to one's detriment by reason of which the plea of estoppel is based. There is no estoppel here."

The petitioner confidently believes that this assignment of error is well taken, for that there is no authority found in the statutes for restricting a taxpayer's case upon his suit in the District Court to the precise and particular grounds for recovery of the tax stated in his claim for refund, and such position is not supported by sound reasoning, nor can it be supported on the theory of estoppel. If this assignment of error is well taken, then the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court be reviewed upon its merits. But if the court should be of the opinion that this assignment is not well taken, then the other assignments must be considered.

THIRD ASSIGNMENT OF ERROR

This assignment of error presents for review the question of the correctness of the conclusion reached by the Circuit Court of Appeals that the grounds relied on in the petition in the suit in District Court are entirely different from those contained in the claim for refund.

With the utmost deference and respect for the views of the Circuit Court of Appeals, this conclusion appears patently erroneous and both unwarranted and unreasonable. The claim for refund expressly adopts the appeal previously filed with the Commissioner and by reference makes the same a part of the claim. A specific statement of the grounds relied on for the refund is set out in this appeal and the same was put in evidence as a part of the Commissioner's letter rejecting the claim, petitioner's Exhibit 5 (R. 54). From this it appears that one of the grounds stated in the claim for refund and alleged as error in the assessment of the tax was that the Commissioner, in determining the petitioner's tax liability, "used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof, as a basis for determining the gain derived therefrom at liquidation" (R. 54-55). In the petition in the suit it is alleged as a ground of plaintiff's cause of action that the corporate stock in question on March 1, 1913, "was of the fair mar-

ket value of $500.00 a share on said date" (R. 3), and "that in ascertaining the gain or loss of the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 [$203.71] per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913" (R. 4).

It would seem that the two statements above quoted clearly relate to the same transaction and clearly present the same question and the same grounds for relief. Both in the claim and in the petition the ground of objection to the Commissioner's action is that he did not take the true and correct March 1, 1913, market value of the corporate stock as the cost basis for determining the profit realized thereon upon liquidation of the corporation in 1920.

Another ground specified in the claim for refund as error in the assessment and collection of the tax is that the Commissioner in determining the petitioner's tax liability, "did not deduct from the capital and surplus of said company [Osage Mercantile Company] at date of liquidation, the full amount of its outstanding liability" (R. 55). In the petition in the suit it is alleged as a part of the plaintiff's cause of action, in respeect of the dis-

*These figures are in error and are corrected by a trial amendment to $203.71 (R. 45).

tribution of the corporation's assets to its stockholders at liquidation "that the net actual and fair market value of the assets so distributed was $88,408.97 on that date" (R. 3-4), and "that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took * * * $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders" (R. 4). It seems that these two statements clearly relate to the same transaction and clearly present the same ground for the relief sought. In both the question is as to the correct and true value of the assets distributed to the stockholders, of whom the petitioner was one, at liquidation of the company in 1920.

Surely the most casual comparison of the language used in the claim and in the petition shows that both relate to the same subject matter, the same transaction, and the same state of facts, and state substantially the same grounds. In both the grounds of error and illegality in the assessment and collection of the tax are clearly stated to be the undervaluation by the Commissioner of the taxpayer's corporate stock on March 1, 1913, which is taken as the cost basis of such stock for the purpose of deter-

mining the gain realized at liquidation in 1920, and the overvaluation by the Commissioner of the assets of the corporation distributed in kind to its stockholders upon liquidation in 1920. Upon this assignment of error no authorities can be presented and no extended argument is necessary. The question is purely one of fact to be determined by a comparison of the language used in the claim for refund with that used in the petition in the suit. If the court, upon examining and comparing the language of those two instruments, cannot see and cannot say that they are in harmony and present in substance the same grounds for the relief sought by the taxpayer, then argument by counsel would be of no avail to convince the court on that point.

Surely the plaintiff in a suit for the recovery of tax is not bound and compelled to use the precise and exact language in stating his cause of action that he has used in his claim for refund in stating the grounds thereof. It should be sufficient to meet the requirements of the law, even if the law should be as announced by the Circuit Court of Appeals, that the grounds alleged and the language used in the claim and in the petition should relate to the same subject-matter and the same transaction, and depend upon the same state of facts in substance. If this is true, then the petitioner confidently asserts that his petition in the suit is based upon the

same grounds set out in his claim for refund, and that the Circuit Court of Appeals is clearly in error in the statement that the petition presents entirely different grounds from those relied on in the claim. Indeed, about the only way in which the petition could have been brought in closer conformity to the claim for refund would have been to have copied the language of the latter *verbatim.*

If this court should be of the opinion that the grounds of recovery alleged in the petition are in substance the same as those alleged in the claim for refund, and that, therefore, this assignment of error is well taken, then it will not be necessary to consider the further assignments of error in respect of the decision of the Circuit Court of Appeals, but the judgment of that court should be reversed, and the judgment of the trial court should be reviewed on the merits. But if the court should hold that this assignment is not well taken, then other assignments must be considered.

FOURTH ASSIGNMENT OF ERROR

This assignment presents the question of whether or not the filing of a sufficient claim for refund as a basis for a subsequent suit is a jurisdictional question, and is not waived, even if not raised in the trial court, but may be raised for the first time in a court of review.

The petitioner contends that, in a suit against a Collector to recover income tax alleged to have been erroneously and illegally assessed and collected, the filing of a claim for refund is not essential to the general jurisdiction of the District Court over the subject matter of the action, but the failure to file such claim is a matter in bar of the plaintiff's right to maintain the suit, and is waived by the defendant if he joins issue and goes to trial and suffers a judgment to be rendered on the merits of the case without making the objection, or in some manner raising the question for the trial court's consideration, that no claim for refund was filed with the Commissioner prior to the suit.

The fact is noted that this action is one against the respondent as an individual in his capacity as collector of internal revenue, and is not one against the United States. The decision of the Circuit Court of Appeals erroneously terms it "a suit against the Government" (R. 86). That it is markedly different in character and subject to different rules and principles of law from a suit against the Government will appear below.

It may be conceded that in suits against the United States the failure of the plaintiff to file a claim for refund prior to suit is a complete bar to his right to maintain the suit, and that such bar cannot be waived by any officer of the United States. *Rock Island R. R. Co.* v.

United States, 254 U. S. 141, 41 Sup. Ct. 55. In this respect it is like the bar of the statute of limitations, which no one has authority to waive on behalf of the United States. *Finn* v. *United States,* 123 U. S. 227, 8 Sup. Ct. 82. But this is contrary to the general rule applicable to private litigants that a defendant may waive his objection to the plaintiff's right to maintain the suit, or any defense thereto or exemption therefrom allowed by law.

The instant case, being one against the collector and not against the United States, is governed by the same rules that apply in actions at law between ordinary private litigants. It is not subject to the same rules of procedure as a suit against the United States, and the defenses applicable are not the same. It is an action at law for money had and received, must be tried to a jury unless a jury is waived in writing by the parties (Section 649, Revised Statutes), and is governed by the rules of procedure prescribed by the laws of the State of Oklahoma in which the District Court in which it was brought is held (Revised Statutes, Section 914), and the judgment of the District Court is only reviewable by writ of error to the Circuit Court of Appeals. "The right to sue the collector for an unjustified collection was given by the common law." *United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U. S. 28, 35 Sup. Ct. 499.

A suit against the United States is purely statutory,

is not triable to a jury under any conditions, and when brought in a District Court, that court sits as a court of claims and the case is governed in form and procedure by the statutes applicable to suits in the Court of Claims, and, prior to the Jurisdictional Act of February 13, 1925, an appeal from the judgment of the District Court would lie direct to the Supreme Court. *J. Homer Fritch, Inc.*, v. *United States*, 248 U. S. 458, 63 L. Ed. 359, 30 Sup. Ct. 158.

An action at law against a Collector is personal to the Collector who collected the tax and will not lie against his successor in office. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 42 Sup. Ct. 1.

An action brought against a collector may, in event of his death *pendente lite*, be revived against his personal representative, for the action is in the nature of assumpsit at common law and survives on the death of the defendant. *Patton* v. *Brady*, 184 U. S. 608, 46 L. Ed. 713, 22 Sup. Ct. 493. In suit against a collector, interest has always been allowed in the event of recovery as for money had and received by him. *Erskine* v. *VanArsdale*, 15 Wall. 75, 21 L. Ed. 63; *Redfield* v. *Bartels*, 139 U. S. 694, 35 L. Ed. 310, 11 Sup. Ct. 683. But before the enactment of the Revenue Act of 1921, which expressly authorized interest on internal revenue taxes refunded (Section 1324, Revenue Act of 1921), no interest was recoverable

in suits brought on claims against the United States in the event of recovery of a judgment (Section 177, Judicial Code). Prior to the amendment of Section 3226, Revised Statutes, by Section 1014 of the Revenue Act of 1924, by inserting a provision therein that suits to recover internal revenue taxes could be maintained regardless of whether or not the tax was paid under protest, it was the rule, established by a long line of decisions, that no suit could be maintained against a collector for the recovery of a tax unless such tax had been paid under protest and duress. See *Fox* v. *Edwards* (C. C. A.), 287 Fed. 669, for a full discussion of the subject and collection of authorities. But after the enactment of Section 252 of the Revenue Act of 1918, a suit could be maintained against the United States for the recovery of an internal revenue tax, although the same had not been paid under protest and duress, but voluntarily. *United States* v. *Hvoslef,* 237 U. S. 1, 59 L. Ed. 813, 35 Sup. Ct. 459; *Rand* v. *United States,* 249 U. S. 503, 508, 63 L. Ed. 731, 39 Sup. Ct. 359; *Coffey* v. *Exchange Bank* (C. C. A.), 296 Fed. 807.

The fact of the marked distinction between a suit against a collector and one against the United States for the recovery of an internal revenue tax, and of the complete independence of such suits of each other, is emphasized by the following language of Mr. Justice Holmes,

speaking for the Court, in *Sage* v. *United States,* 250 U. S. 33, 37, 63 L. Ed. 828, 39 Sup. Ct. 415:

> "But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388, 46 L. Ed. 954, 963, 22 Sup. Ct. 650. At the time the judgment is entered the United States is a stranger."

The respondent in the instant case, being a natural person and privileged to assert or waive any of his defenses or exemptions, could waive, for example, the defense of the statute of limitations. The general rule, always applicable in the case of private litigants, is that limitation does not operate by its own force as a bar, but is a defense which the party who relies thereon must plead if he wishes the benefit of its provisions. *Finn* v. *United States,* 123 U. S. 227, 8 Sup. Ct. 82; *Sanger* v. *Nightingale,* 122 U. S. 176, 7 Sup. Ct. 1109. In the latter case it was held that a Georgia statute which provided that after the period of limitation, "both the right and right of action to enforce it shall be forever barred" was not a peremptory discharge of the debt, but was a mere

statute of limitations, which, to be available, must be pleaded.

Again Section 51 of the Judicial Code provides that:

> "* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is clear that this statute does not define or fix the jurisdiction of a District Court over the subject matter of an action, and that a suit may be brought in a district other than that of which the defendant is an inhabitant, and if the defendant appears and defends without objection, his right to object is thereby waived, and the District Court has full and complete jurisdiction to render judgment on the merits of the cause. As stated in *Lee* v *Chespeake & O. Ry. Co.*, 260 U. S. 653, 655, 67 L. Ed. 443, 43 Sup. Ct. 230:

> "This provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

See, also, *General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 272, 67 L. Ed. 244, 43 Sup. Ct. 106; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385, 44 Sup. Ct. 391. The latter case involved a similar statute prescribing the place of jurisdiction in admiralty cases.

It will be noted that Section 3226, Rev. Stat., as amended by Section 1014 of the Revenue Act of 1924, which provides that no suit or proceeding shall be maintained for the recovery of any internal revenue tax until a claim for refund has been filed with the Commissioner, also provides that no such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of payment of the tax unless within two years after the disallowance of the claim by the Commissioner. Apparently the provision for the filing of a claim for refund prior to suit is the same sort of defense or bar to the suit as the statute of limitations. Suppose after a claim is filed with the Commissioner, but within six months and prior to his rejection thereof, a suit is brought for the tax against a collector. The collector makes no objection, either in his pleadings or in any other form upon the trial of the cause, that the action is prematurely brought and cannot be maintained because the claim for refund had not been on file with the Commissioner for six months and had not been rejected by him, but the case is tried on the merits and a final judgment rendered. In such case has not the collector waived the defense that the action is prematurely brought? Is not the jurisdiction of the dis-

trict court unimpaired to render a valid judgment in the action where such question of the premature commencement of the suit is not raised? And in that case could such question, not raised at all in the trial court, be raised for the first time in a court of review? Upon sound reasoning and by analogy from all the authorities upon similar statutes, the collector has waived his defense that the action was prematurely brought, and the trial court had complete jurisdiction to render a valid judgment, and the premature commencement of the suit could not be raised for the first time and assigned as error in a court of review.

The section of the statute above referred to is in part a statute of limitations. It provides that suit cannot be brought after five years from payment of the tax unless brought within two years from rejection of the claim for refund by the Commissioner. The filing of the claim tolls the statute. As we have seen under the authorities cited above, the collector, in a suit against him for the tax, could waive the statute of limitations, and would in fact waive it unless he pleaded it as a defense. This notwithstanding it could not be waived by the United States as defendant in a suit for the tax.

So in respect to the rule in force prior to the Revnue Act of 1924 that suit could not be maintained against a collector to recover a tax unless such tax was paid

under protest. Failure to pay under protest was a defense or a bar to the plaintiff's action, which the collector, as a private litigant, could waive, if he chose to do so. If he joined issue with the plaintiff on the question of the legality or illegality of the exaction and collection of the tax, and the case was tried out to a final judgment on that issue, without any question of failure to pay under protest being raised in the trial court or presented in the record, under the rule supported by the cases cited, such defense or bar to the plaintiff's action would be waived, and the judgment of the district court could not be said to be void for want of jurisdiction, and such question could not be raised for the first time and assigned as error in a court of review.

The petitioner contends, therefore, that the various statutes or rules of law prescribing the district in which a defendant may be sued, and for filing a claim for refund prior to suit, and denying the right to sue for a certain length of time after filing the claim, and limiting the right to sue to a certain time after payment of the tax or rejection of the claim, are all of the same nature and of the same class and are mere defenses, privileges or exemptions granted to a collector in a suit against him to recover tax, but that they were not intended to and do not in any respect affect, limit and restrict the general original jurisdiction of the District Courts as defined in

Section 24 of the Judicial Code. They relate solely to the burdens, rights and privileges of the parties, and, not going to the general jurisdiction of the court, may be waived by the party for whose benefit they were created. Of course, if these provisions do limit the general jurisdiction of the District Court, as conferred by said Section 24 of the Judicial Code, then they cannot be waived and a failure to comply with them may be raised at any time and in any court. Indeed, in such case, the judgment of the District Court would be void for want of jurisdiction and subject to collateral attack in any other suit, or to be vacated upon motion at any time by the court in which rendered. And where the District Court did not have general jurisdiction of the subject matter of the action, it could not be conferred, or objection to the lack of it waived, by agreement or consent of the parties. But if the provisions of the statutes in respect to claims for refund and limitation of time to sue do not go to the general jurisdiction of the District Court, and so constitute an amendment or *pro tanto* repeal of Section 24 of the Judicial Code, then they may be considered as waived by a collector as defendant where he does not claim the benefit of them in the trial court. And if he there claimed the benefit of them and his claim was overruled by the court, a judgment against him might be erroneous, but would not be void for want of juris-

diction, and the error of it could be reviewed only in a direct proceeding for review on writ of error. But unless the question was raised and preserved in the record in the trial court, it could not be raised for the first time and assigned as error in the court of review.

In respect of the instant case, however, it must be borne in mind at all times that the petitioner did in fact file a claim for refund on the form prescribed for that purpose by the Secretary of the Treasury, and that such claim was not in general terms, but stated specific reasons for the refund, and was filed in apt time and was held by the Commissioner almost a year without action before suit was commenced, and was rejected after suit had been commenced,, and that all of these facts were pleaded and proven in the case. The objection, raised for the first time in the Circuit Court of Appeals, and now being considered, is that the claim for refund was not legally sufficient to support the petitioner's subsequent suit, and for the purpose of the suit was the same as no claim at all, for that it stated different reasons for claiming a refund of the tax from those which the petition in the suit stated for the recovery of it. But this objection was not made, nor was any objection made, in the trial court to the sufficiency in form, correctness and substance of the claim for refund as a basis for the petitioner's suit and no such question

was presented to, considered or passed upon by the trial court, but the objection was raised for the first time in the Circuit Court of Appeals.

In the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891, the Circuit Court of Appeals for the Fifth Circuit passed on this precise question. There the record did not show that any claim for refund at all had been filed prior to suit, but objection on that ground had not been made in the trial court and was raised for the first time in the Circuit Court of Appeals. The suit was against a collector for the recovery of tax, and not against the United States. In passing on the question, the court said:

> "No such question was raised in the District Court, nor by the assignments of error. Had it been, it might have been met by further allegation and proof, if such were necessary. We do not think it can be raised here for the first time. (*Retzer* v. *Wood, Collector,* 109 U. S. 185, 3 Sup. Ct. 164, 27 L. Ed. 900; *Green County* v. *Thomas' Executor,* 211 U. S. 598, 602, 29 Sup. Ct. 168, 53 L. Ed. 343)."

In that case the judgment for the tax went against the collector in the trial court, and he took the case on writ of error to the Circuit Court of Appeals for review. The instant case presents the anomalous situation of a judgment in the trial court in favor of the defendant on the merits of the plaintiff's allegations that the tax was erroneously and illegally assessed and collected, and of

the plaintiff taking the case on writ of error to the Circuit Court of Appeals for review, and of the defendant, without any cross-proceeding for review, or any assignments of error in the Circuit Court of Appeals, there for the first time raising the question that, because the plaintiff's claim for refund was fatally insufficient and defective, it amounted to no claim at all, and therefore, he had no right to maintain the suit and the trial court had no jurisdiction to render a judgment on the merits of the case, and contending that for that reason the Circuit Court of Appeals ought to affirm the judgment against the plaintiff upon the merits of his cause of action.

The rule that questions cannot be raised in an appellate court for the first time when they were not raised, presented or passed upon in the lower court, is so well established, so universal and well understood, that it is unnecessary to present any extended authority upon it. In the case of *Morrill* v. *Jones,* 106 U. S. 466, 1. S. Ct. 423, 425, 27 L. Ed. 267, the court said:

> "It has been argued here that, as it appears from the testimony which has been incorporated into the bill of exceptions that the importation in this case was from Prince Edward's Island, it was not from 'beyond the seas.' And therefore, that the judgment below was right. It is a sufficient answer to this objection that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on

> the trial and incorporated in some form into the record, 'an authenticated transcript' of which is returned with our writ of error."

The case of *Meyer* v. *W. R. Grace & Co.*, 290 Fed. 785, 786, decided by the United States Circuit Court of Appeals, 7th Circuit, is also in point here. In that case the court said:

> "Throughout the trial the court asserted and acted on the assertion that defendant's affidavit of a meritorious defense had the effect, under the Illinois practice, of admitting the whole of the plaintiff's case as pleaded in the verified declaration, except the one issue respecting the quality of the goods; and defendants never suggested any intention of amending their affidavit of defense in any respect except a suggestion that they desired to introduce evidence to show that plaintiff had elected a different remedy. Whether the trial court was right or wrong with respect to the Illinois practice and the federal conformity statute (Comp. St., Sec. 1537), the defendants in this court cannot raise an issue which they agreed in the trial court did not exist."

And in the recent case of *Edward Hines Yellow Pine, Trustees*, v. *Martin et al.*, 268 U. S. 458, 465, 69 L. Ed. 1050, this court said:

> "This court is a court of review, and it will not consider questions not raised or disclosed by the record brought to it for review, and which were not considered by the courts below."

Numerous cases are cited in support of the foregoing text. A fuller citation of authoritiy on this point is unnecessary.

The petitioner concludes, therefore, in respect of this assignment of error that the rule is that, in an action against a collector for the recovery of an internal revenue tax, the filing of a claim for refund with the Commissioner prior to suit is not necessary to the jurisdiction of the District Court over the action. Failure to file such claim is a defense or bar to the plaintiff's suit which the defendant may waive, if he chooses. This conclusion is based on the authorities cited above. From this it follows that where no claim is filed, if no objection on that ground is made, and no question in respect thereto is raised, in the trial court, or disclosed in the record, it cannot be raised for the first time in a court of review.

But the petitioner contends further that, as respects the instant case, even if the filing of a claim prior to suit was necessary to the jurisdiction of the District Court over the action, still the record shows that such claim was filed, and was filed in apt time, and upon the form prescribed by the Treasury Department, and was not a mere general claim, but stated the specific grounds upon which refund of the tax was sought, and that the objection raised is merely that there was not sufficient conformity in the grounds alleged for recovery in the petition in suit to the grounds alleged for refund in the claim, and that the record shows that no question of the insufficient conformity, or the non-conformity, of the allegations of the

petition to the allegations of the claim was raised in the trial court or considered or decided by that court, but such question and objection were made and raised for the first time in the Circuit Court of Appeals, and were there raised and urged as a ground or reason why the judgment of the District Court in favor of the respondent upon the issues of the erroneous and illegal assessment and collection of the tax should be affirmed, and that solely upon this ground the said judgment was affirmed by the Circuit Court of Appeals. The petitioner contends that this question, not having been raised in the trial court in any way, shape, manner or form, and not being jurisdictional, was waived by the respondent and could not rightfully be raised in and considered by the Circuit Court of Appeals when the case was there for review.

If this assignment of error is well taken, then the remaining assignment of error in respect of the judgment of the Circuit Court of Appeals need not be considered, but its judgment should be reversed, and the judgment of the trial court be reviewed on the assignments of error in respect thereto.

FIFTH ASSIGNMENT OF ERROR

This assignment of error presents the question of the correctness of the judgment of the Circuit Court of

Appeals affirming the judgment of the District Court, even if it be conceded that the holding of the Circuit Court of Appeals on the law is correct.

It appears from the opinion of the Circuit Court of Appeals that the judgment of the District Court is affirmed for the reason that the claim for refund filed by the petitioner prior to suit is, as considered and held by that court, so different from the cause of action stated in his petition that it is the same as no claim at all insofar as it furnishes the basis for the petitioner's suit. Or in other words, that the allegations of the petition in suit are such a departure from the allegations of the claim for refund that, as respects the suit, it stands as though no claim for refund had been filed before it was brought, and that, therefore, it could not be maintained in the District Court. The opinion of the court does not expressly say that it holds that the District Court was without jurisdiction, but its conclusion cannot be based on any other theory or ground than want of jurisdiction in the District Court over the case. If the point stressed by the Circuit Court of Appeals did not go to the jurisdiction of the District Court, then it was waived, because not raised in the District Court, and could not be considered by the Circuit Court of Appeals upon review.

That the Circuit Court of Appeals for the Eighth Circuit is definitely committed to the holding that the

filing of a claim for refund before suit, and the statement of specific grounds as reasons for the refund, and the conformity of the grounds for recovery alleged in a suit to those stated in the claim are all necessary to the jurisdiction of the court in the suit, is clearly shown by its decision in *Redwing Malting Co.* v .*Willcuts,* 15 F. (2d) 626, in which appears the following language:

> "It does not appear from the record that any claim under Sub-section (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to beginning this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the court upon an entirely different and distinct ground from that presented to the Commissioner."

It seems clear, therefore, that the position of the Circuit Court of Appeals is that the District Court was without jurisdiction because of the inadequate claim for refund, to render a judgment upon the merits of the case. Having taken this position, the Circuit Court of Appeals proceeded to render judgment affirming the judgment of the District Court in favor of the defendant upon the merits for the reason that such court was without jurisdiction to render any judgment upon the merits. Clearly

the judgment of the Circuit Court of Appeals is wrong, even when based upon its own holdings and conclusions of fact and law. If its reasoning and conclusion upon the law and facts of the case as stated in its opinion are correct, then its judgment should have been that the judgment of the District Court be reversed for want of jurisdiction and the cause remanded with directions to dismiss the plaintiff's case. It is a contradiction in terms to say that the judgment of a court rendered without jurisdiction should be affirmed on the ground of such lack of jurisdiction.

On this point the petitioner cites again the cases, already cited above herein, of *Webster* v. *Fall,* 266 U. S. 507, 69 L. Ed. 411; *Gnerich* v. *Rutter,* 265 U. S. 388, 68 L. Ed. 1068, 44 Sup. Ct. 532; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28-34, 41 L. Ed. 621, 623, 17 Sup. Ct. 225.

If none of the four preceding assignments of error in respect of the judgment of the Circuit Court of Appeals are held to be well taken, but this one is well taken, then the judgment of this court should be that the judgment of the Circuit Court of Appeals be reversed, and also that the judgment of the District Court be reversed with directions to dismiss the case for want of jurisdiction.

THE JUDGMENT OF THE TRIAL COURT

If this court should sustain any one or all of the first, second, third or fourth assignments of error in respect of the judgment of the Circuit Court of Appeals, then it will become necessary to review the judgment of the trial court on the merits. Therefore, the petitioner will here consider his specifications of error in respect of the judgment of that court. These have already been grouped under four heads as set forth above. They will be taken up in order.

FIRST SPECIFICATION OF ERROR

This presents the question of the correctness of the action of the trial court in deducting the amount of cash dividends paid and real estate distributed between March 1, 1913, and May 14, 1913, out of surplus of the Osage Mercantile Company on hand at March 1, 1913, from the agreed value of the assets of said corporation on March 1, 1913, and taking the remainder of the value of said assets as cost for determining the gain realized by the petitioner on his stock at liquidation of the corporation in 1920. If the distribution of real estate above mentioned was a dividend, and if the distribution thereof and the cash dividend paid out of surplus earned prior to March 1, 1913, were current, as distinguished from liquidating, dividends, then the judgment of the District Court is erroneous under the law.

There is no controversy over the facts in this case. The evidence of the petitioner was not disputed on any point of fact. The only conflict is one of opinion, or of the conclusions of fact to be drawn from the primary facts. The plaintiff in error and R. W. Tucker and Hutchins, who were stockholders in the Osage Mercantile Company at the time the Mercantile Real Estate Company was organized and the real estate transferred to it, considered the disposition of the real estate as a dividend to the stockholders of the old company. The transaction was shown on the books as a sale of the real estate, but the price at which it was sold was a little less than three-eighths of its book value and still less than that of its actual value. The transaction, therefore, plainly was not a sale in the ordinary course of business in which the seller would demand and the buyer would expect to pay the fair market value of the property. The named consideration was only nominal, and the actual consideration was the benefit to the stockholders of the old corporation which they received by virtue of their stock in the new one. The motive and the result of the transfer was to place the title to the real estate in the new corporation instead of the old, without changing the proportionate interest of the stockholders therein, but separating the real estate from the other surplus of the old and giving each stockholder his

interest therein in severalty in the form of his stock certificate in the new corporation. This was done through the form of a sale, but with no actual consideration passing from the purchaser or received by the seller, because no money actually changed hands, but the whole transaction was consummated by means of checks, each of which was offset by a corresponding credit to the drawer. The stockholders in the new corporation paid for the stock with their checks, which in turn were paid over to the old corporation, which in turn issued dividend checks for the same amounts to the same stockholders who had given their checks to the new corporation. This completed the circle and made the whole transaction purely one on paper. The stockholders in the two corporations said in their testimony that they considered the matter as a dividend of the real estate in the form of stock in the new corporation.

The witness Dye testified that the transaction was handled on the books of the corporation as a sale, but that it was obviously not a *bona fide* sale, and that, in his opinion it was a gift, but not a dividend.

The court in its findings sets forth the facts of the transaction without stating whether the disposition of the real estate in the manner shown was or was not a dividend.

TRANSFER OF REAL ESTATE WAS A DIVIDEND

The petitioner's first contention is that the real estate transferred from the Osage Mercantile Company to the Mercantile Real Estate Company of the agreed net value of $40,150.00 was a dividend to its stockholders. It is conceded that it lacks the essential elements of a sale. If it was transferred as a gift, or partly so, then to the extent it was a gift, it was one from the old corporation to its stockholders, for it went to the new corporation in which all of the stock was held by the stockholders of the old in the same proportions as they held in the old. Such a gift would be plainly and purely for their benefit. A gift distributed by a corporation out of accumulated profits to or for the benefit of its stockholders severally, solely because of the fact that they are its stockholders, and apportioned among them according to their stockholdings, and the distributive share of each separated and placed upder his individual control, is nothing more nor less than a dividend.

In 14 C. J. 798, the following definition of a dividend is given:

> "The term 'dividend' as applied to corporate stock may be defined as that portion of the profits and surplus funds of a corporation which has been actually set apart, by a valid act of the corporation, for distribution among the stockholders according to their respective interest, in such a sense as to be-

come segregated from the property of the corporation, and to become the property of the stockholders distributively."

Among the numerous judicial definitions of a dividend set out in a note to the foregoing text are the following:

"Corporate funds derived from the business and earnings of the corporation, appropriated by the corporate act to the use of and to be divided among stockholders." *Hyatt* v. *Allen,* 56 N. W. 553, 556, 15 A. M. R. 449.

"That portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." *Mobile, etc., R. Co.* v. *Tennessee,* 153 U. S. 486, 496, 14 S. Ct. 968, 38 L. ed. 793.

"Such profits, or such portion of the profits, as the directors, by proper resolution, have ordered distribution among the stockholders." *Knight* v. *Alamo Mfg. Co.,* 190 Mich. 223, 226, 157 N. W. 24.

"That portion of the profits which is set apart, and divided by the directors or managers of the corporation among the stockholders." *Parks* v. *Automatic Bank Punch Co.,* 14 Daly 424, 426, 14 N. Y. St. 710.

"That portion of its profits, which the directors separate from the general stock, and apply to the benefit of the stockholders." *State* v. *Farmers' Bank,* 11 Oh. 94, 95.

"All distributions to corporators, of the profits of the corporation, whether such distributions were large or small; or whether made at long or short intervals; and without any regard to the manner or

place of their declaration or mode of payment." *Clarkson* v. *Clarkson,* 18 Barb. (N. Y.) 646, 657.

"A fund set apart by a corporation, out of its profits, to be apportioned among the shareholders." *Lancaster Trust Co.* v. *Mason,* 151 N. C. 264, 269, 65 S. E. 1015.

'Earnings of the company to be divided among its shareholders in proportion to their respective holdings." *Com.* v. *Western Land, etc. Co.,* 156 Pa. 455, 472, 26 A. 1034.

Clearly, under the foregoing definitions, the real estate transaction under consideration was a dividend from the Osage Mercantile Company to its stockholders. Especially is this true in view of the often announced rule that in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder, the courts will regard matters of substance and disregard forms. *Lynch* v. *Turrish,* 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087; *Southern Pac. Co.* v. *Lowe,* 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142; *Gulf Oil Corporation* v. *Lewellyn,* 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133; *Eisner* v. *Macomber,* 252 U. S. 189, 40 Sup .Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *United States* v. *Phellis,* 257 U. S. 156, 42 Sup Ct. 63, 66 L. Ed. 180.

The petitioner is not contending that the real estate transaction was a sale, although it was so set up on the books of the corporation. The Commissioner of Internal Revenue did not contend that it was a sale. Ob-

viously, if it was a sale, the old corporation received and had the purchase price in lieu of the real estate. This sum without dispute was distributed to its stockholders in a formal dividend paid by check. The transaction thus construed would mean that the corporation had converted part of its earned surplus at March 1, 1913. into cash and then distributed the cash in a dividend in May, 1913. So that if the transaction should be considered as a sale, the same result is reached, for instead of the real estate itself being distributed as a dividend to the stockholders, the proceeds derived from the sale of it are so distributed.

DISTINCTION BETWEEN CURRENT AND AND LIQUIDATING DIVIDENDS

If it be established that the disposition made of the real estate constituted a dividend, the question next to be determined is whether it was a current or a liquidating dividend. The plaintiff in error contends that it was a current dividend. The Commissioner treated it as a liquidating dividend. If a liquidating dividend, then it was a partial realization of the March 1, 1913, value of the stock, the remainder of which was realized on the final liquidation of the corporation in 1920, the two combined constituting the full amount realized thereon.

For the purpose of determining loss or gain on the

sale or disposition of property acquired prior to March 1, 1913, its fair market price or value on that date is taken as costs. Section 202 (a) of the Revenue Act of 1918, in force at the liquidation of the old corporation in 1920, is as follows:

> "That for the purpose of ascertaining the gain derived or loss sustained from the sale or disposition of property, real, personal or mixed, the basis shall be (1) in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date, and (2) in the case of property acquired on or after that date, the cost thereof."

Therefore, the fair market value of the stock of the petitioner on March 1, 1913, it its cost for the purpose of ascertaining the gain derived upon his final disposition of it.

The distinction between current and liquidating dividends is clearly set forth in Article 1548 of Regulations 45, promulgated by the Commissioner of Internal Revenue under the Revenue Act of 1918. This is as follows:

> "Art. 1548. *Distribution in liquidation.* So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value

> as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.''

It follows, therefore, that if the cash and real estate distributed in 1913 out of earnings and surplus of the corporation on hand at March 1, 1913, was a current dividend, the amount received by the petitioner was income to him in that year and taxable as such. It also follows that if it was taxable income in 1913, it could not also be taxed as income in 1920. If it was a liquidating dividend, it was a partial realization of the cost or March 1, 1913, value of his stock and was not income and not taxable, but could properly be combined with the final realization thereof on liquidation of the corporation in 1920 to constitute the full amount realized on the complete disposal of his stock, and the excess of these combined realizations over its March 1, 1913, value would be gain to him in 1920, and would con-

stitute taxable income in that year. This, as the plaintiff in error understands it, is the position of the Commissioner of Internal Revenue.

STOCK IN NEW CORPORATION WAS DIVIDEND FROM OLD

In support of his contention that the stock in the Mercantile Real Estate Company was a dividend, the petitioner cites the following authorities: *U. S.* v. *Phellis,* 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180; *Rockefeller* v. *U. S.,* 257 U. S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186; *Marr* v. *U. S.,* 268 U. S. 536, 45 Sup Ct. 575.

In *United States* v. *Phellis,* the facts were that Phellis held stock in the E. I. duPont de Nemours Power Co., and that a new corporation by the name of the E. I. duPont de Nemours & Co. was organized and took over the assets and business of the old company. The old company had an excess of assets over liabilities showing a large surplus of accumulated profits. The new company issued stock against this accumulated surplus so that the stockholders in the old company received two shares of stock in the new for each one held in the old. The old company retained an amount of cash and received an amount of debenture stock in the new company sufficient to redeem its outstanding bonds and maintain its capital stock unimpaired, and continued as a going

concern, but did no business except to redeem its bonds, make some stock exchanges and collect and dispose of dividends. The transfer of assets, issue of stock, and consummation of the transaction was done as of October 1, 1915, and so came under the Revenue Act of 1913. The opinion of the court does not state specifically that the surplus against which the new stock was issued was accumulated prior to March 1, 1913, but the amount of such surplus, and the facts and circumstances of the situation disclosed, fairly indicate that at least the larger part of it was so accumulated. The court held that the shares of stock in the new company were a dividend to the stockholders of the old company and that the value of the new stock, which represented the distribution of surplus or accumulated profits, was income taxable to the stockholders in the year received. The organization of the new company and the transfer of assets of the old company to the new and the issue of stock in the new to the stockholders in the old is not different in any material respect from the transaction of the Osage Mercantile Company and the Mercantile Real Estate Company involved in the instant case.

In the opinion the court says:

> "Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the test laid

down in *Eisner* v. *Macomber,* 252 U. S. 189, 207, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R.1570), a gain, derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal.

* * * * * * * * * * *

"The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which is now held to represent its surplus of accumulated profits—still, however, a common fund in which the individual stockholders of the old company had no separate interest. But when this common stock was distributed among the common stockholders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former corporate profits, and drawn by them severally for their individual and separate use and benefit. Such a gain resulting from their ownership of stock in the old company and proceeding from it constituted individual income in the proper sense.

* * * * * * * * * * *

"In thus creating the common stock of the new company and transferring it to the old company for distribution pro rata among its stockholders, the parties were acting in the exercise of their rights, for the very purpose of placing the common stockholders individually in possession of new and substantial property rights *in esse,* in realization of

their former contingent rights to participate eventually in the accumulated surplus. No question is made but that the proceedings taken were legally adequate to accomplish the purpose. The new common stock became treasury assets of the old company, and was capable of distribution as the manufacturing assets whose place it took were not. Its distribution transferred to the several stockholders new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers. According to the findings the stock thus distributed was marketable. There was neither express nor implied condition, arising out of the plan of reorganization or otherwise, to prevent any stockholder from selling it; and he could sell his entire portion or any of it without parting with his capital interest in the parent company, or affecting his proportionate relation to the interest of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.

"It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit derived from his capital interest in the old company, not in liquidation of the capital, but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for separate use. Hence it constituted individual income within the meaning of the Income Tax Law, as clearly as was the case of *Peabody* v. *Eisner*, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152."

In *Rockefeller* v. *U. S.*, decided the same day as *U. S.* v. *Phellis,* the facts were that the Prairie Oil & Gas Company prior to the year 1914 was engaged in producing, purchasing and selling crude petroleum and transporting it through its pipe lines. At the same time the Ohio Oil Company was engaged in the same kind of business. In order to avoid a probable conflict of Federal authority between the Interstate Commerce Commission and the Federal Trade Commission, indicated by certain legislation enacted and court decisions rendered in 1914, it was determined by each company upon advice of counsel that its pipe line property should be owned and operated by a separate corporation. The stockholders of the Prairie Oil & Gas Company caused a new corporation to be organized by the name of the Prairie Pipe Line Company, to which all the pipe line property of the old company was transferred in consideration of the issue and delivery of the entire capital stock of the new company pro rata to the stockholders of the old one. Similarly the stockholders of the Ohio Oil Company caused a new corporation to be formed by the name of the Illinois Pipe Line Company, to which all the pipe line property of the old company was transferred in consideration of the issue to it of the entire capital stock of the new company, which was at once distributed pro rata to the stockholders of the old one.

The only difference in the arrangements carried out by the two old corporations was that in the case of the Prairie Oil & Gas Company the stock in the new pipe line company was issued directly to its stockholders, whereas in the case of the Ohio Company the stock in the new pipe line company was issued to the old company,which immediately distributed the same to its stockholders in the form of a dividend. The new companies were each capitalized at the actual value of the pipe line property received, and in each case the transfer of its pipe line property left the capital of the old company unimpaired. The transaction occurred in 1915 and so the Revenue Act of 1913 applied. The opinion does not specifically state that the pipe line properties represented accumulated profits or surplus at March 1, 1913, but the value of these properties, $27,000,000.00 for the Prairie pipe lines and $20,000,000.00 for the Ohio pipe lines, and the fact that the transaction occurred in 1915, would fairly indicate that they did so either in whole or for the most part.

The court held that the stock in the new companies was in each case a current dividend by the old companies to their stockholders out of accumulated surplus and was taxable as income to the stockholders in the year received. In the opinion it is said:

"Under the facts as recited we deem it to be too

plain for dispute that in both cases the new pipe line company shares were in substance and effect distributed by the oil company to its stockholders; as much so in the case of the Kansas company, where the new stock went directly from the pipe line company to the stockholders of the oil company, as in the case of the Ohio company where the new stock went from the pipe line company to the oil company and by it was transferred to its stockholders. Looking to the substance of things the difference is unessential. In each case the consideration moved from the oil company in its corporate capacity; the new company's stock issued in exchange for it was distributed among the oil company's stockholders in their individual capacity, and was a substantial fruit of their ownership of stock in the oil compnay, in effect a dividend out of the accumulated surplus.

"The facts are in all essentials indistinguishable from those presented in *United States* v. *Phellis*, 257 U. S. 156, 42 Sup. Ct. 63, 66 L. Ed. 180, decided this day. In these cases, as in that, regarding the general effect of the entire transactions resulting from the combined action of the mass of stockholders, there was apparently little but a reorganization and ownership of stock in the oil company, in effect a financial readjustment of the affairs of the companies concerned, here a sub-division of companies, without immediate effect upon the personnel of the stockholders, or much difference in the aggregate corporate activities or properties. As in the Phellis case, the adoption of the new arrangement did not of itself produce any increase of wealth to the stockholders, since whatever was gained by each in the value of his new pipe line stock was at the same moment withdrawn through a corresponding diminution of the value of his oil stock. Nevertheless the new stock represented assets of the oil companies standing in the place of the pipe line properties that

before had constituted portions of their surplus assets, and it was capable of division among stockholders as the pipe line properties were not. The distribution, whatever its effect upon the aggregate interest of the mass of stockholders, constituted in the case of each individual a gain in the form of actual exchangeable assets transferred to him from the oil company for his separate use in partial realization of his former indivisible and contingent interest in the corporate surplus. It was in substance and effect, not merely in form, a dividend of profits by the corporation, and individual income to the stockholder."

There is no distinction in substance, and scarcely any in form, between the transactions involved in the foregoing case and the one involved in the instant case. If the stock in the new pipe line companies was a dividend from the old companies to their stockholders, then the stock of the plaintiff in error in the Mercantile Real Estate Company was a dividend from the Osage Mercantile Company. And since their stock was taxable income in the year received, his was too.

In *Marr* v. *U. S.* the facts were that Marr and wife prior to March 1, 1913, owned certain shares of stock in the General Motors Company of New Jersey. In 1916 they received in exchange for this stock certain shares of stock in a new corporation named the General Motors Corporation of Delaware. The new corporation issued its stock in exchange. for the stock of the old on a stipulated basis. The Treasury Department ruled that the

difference between the cost to Marr and wife of their old stock and the value of the stock in the new corporation was gain or income subject to tax. The taxpayer contended that the transaction between the two corporations was merely a reorganization of the one business and that, while he had a larger number of shares of stock in the new corporation than he held in the old, yet they represented no larger value than he had before the transaction and so he had realized no gain. The court held adversely to him and ruled that the difference between the cost of the old stock and the value of the new was taxable gain. In the opinion it is said:

> "The government insists that identity of the business enterprise is not conclusive, that gain in value resulting from profits is taxable as income, not only when it is represented by an interest in a different business enterprise or property, but also when it is represented by an essentially different interest in the same business enterprise or proprty; that, in the case at bar, the gain actually made is represented by securities with essentially different characteristics in an essentially different corporation; and that, consequently, the additional value of the new securities, although they are still held by the Marrs, is income under the rule applied in *United States* v.*Phellis*, 257 U. S. 156, 42 S. Ct. 63, 66 L. Ed. 180; *Rockefeller* v. *United States*, 257 U. S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186; and *Cullinan* v. *Walker*, 262 U. S. 134, 43 Sup. Ct. 495, 67 L. Ed. 906. In our opinion the government is right."

The rule that where stock in a new corporation is

distributed directly or indirectly to the stockholders of an old one in consideration for its assets, in whole or in part, such stock is a dividend and taxable as income to the stockholders, seems to be extended to the very limit in *Marr* v. *U. S.* The case is cited here because it appears that the contention of the government there which the court approved is an admission of the contention of the petitioner here.

The petitioner says that the foregoing authorities establish conclusively that the stock in the Mercantile Real Estate Company which he received in 1913 was a dividend on his stock in the Osage Mercantile Company. It was an asset of exchangeable and actual value from his capital interest in the old company, proceeding from it as a result of a division of former corporate profits and drawn by him separately for his individual and separate use and benefit. (*U. S.* v. *Phellis.*) It was a substantial fruit of his ownership of stock in the old company, in effect a dividend out of the accumulated surplus (*Rockefeller* v. *U. S.*).

THE 1913 DIVIDENDS WERE CURRENT DIVIDENDS

In support of his contention that the dividend received in 1913 in stock and in cash distributed out of accumulated profits or surplus at March 1, 1913, was a

current as opposed to a liquidating dividend and was taxable as income in that year, the petitioner cites the following authorities: *Lynch* v. *Turrish,* 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087; *Lynch* v. *Hornby,* 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149; *Peabody* v. *Eisner,* 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152; and also *U. S.* v. *Phellis* and *Rockefeller* v. *U. S., supra.*

In *Lynch* v. *Turrish,* the Court held that a final dividend in liquidation of a corporation in 1914 in excess of the par value of the stock could not be considered income as to such excess and taxable in that year, but was merely the realization of the fair market price of the stock created before and existing at March 1, 1913. The point that this was a liquidating dividend, not a current dividend, and so not taxable, is emphasized in the following statement in the opinion:

> "And in determining the application of the statute to Turrish we must keep in mind that on the admitted facts the distribution received by him from the Payette Company manifestly was a single and final dividend in liquidation of the entire assets and business of the company, a return to him of the value of his stock upon the surrender of his entire interest in the company, and at a price that represented its intrinsic value at and before March 1, 1913, when the act took effect."

In *Lynch* v. *Hornby,* decided the same day as *Lynch* v. *Turrish,* the Court laid down the rule that where a

corporation declared a dividend out of surplus earned prior to March 1, 1913, yet did not liquidate, but continued its corporate business after as before, such dividend was a current and not a liquidating dividend and was taxable income to the stockholder in the year received. The distinction between this case and *Lynch* v. *Turrish* is clearly set forth in the following from the opinion:

> "The case was tried in the District Court and argued in the Circuit Court of Appeals together with *Lynch, Collector,* v. *Turrish,* 236 Fed. 653, 149 C. C. A. 649, and was treated as presenting substantially the same question upon the merits. In our opinion it is distinguishable from the Turrish case, where the distribution in question was a single and final dividend received by Turrish from the Payette Company in liquidation of the entire assets and business of the company and a return to him of the value of his stock upon the surrender of his entire interest in the company, at a price that represented its intrinsic value at and before March 1, 1913, when the Income Tax took effect.
>
> "In the present case there was no winding up or liquidation of the Cloquet Lumber Company, nor any surrender of Hornby's stock. He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion might declare. *Gibbons* v. *Mahon,* 136 U. S. 549, 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. The operations of this company in the year 1914 were, according to the facts pleaded, of a nature essentially like those in which it had been engaged for more than a quar-

ter of a century. The fact that they resulted in converting into money, and thus setting free for distribution as dividends, a part of its surplus assets accumulated prior to March 1, 1913, does not render Hornby's share of those dividends any the less a part of his income within the true intent and meaning of the act.

* * * * * * * * *

"Hence we construe the provision of the act that 'the net income of a taxable person shall include gains, profits, and income derived from * * * interest, rent, dividends, * * * or gains, or profits and income derived from any source whatever' as including (for the purposes of the additional tax) all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913. In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital.

* * * * * * * * *

"Of course we are dealing here with the ordinary stockholder receiving dividends declared in the ordinary way of business. *Lynch, Collecter* v. *Turrish* and *Southern Pacific Co.* v. *Lowe, Collector,* this day decided rest upon their special facts and are plainly distinguishable."

In *Peabody* v. *Eisner,* decided the same day as

Lynch v. *Turrish* and *Lynch* v. *Hornby,* the Court followed the holding in the latter case. The facts were that Peabody received a dividend in 1914 on stock in the Union Pacific Railroad Company which he owned prior to March 1, 1913. The dividend consisted of cash and stock in the Baltimore & Ohio Railroad Company. In his tax return he omitted the portion of the dividend which he considered to be a distribution of earnings of the corporation prior to March 1, 1913. The Court says:

> "Afterwards he was subjected to an additional assessment upon a valuation of the balance of his dividend, and this, having been paid under protest, is the subject of the present suit, the theory of which is that the entire earnings, income, gains, and profits from all sources realized by the Union Pacific Railroad Company from March 1, 1913, to March 2, 1914, remaining after the payment of prior charges, did not exceed $4.12 per share of the Union Pacific common stock, and that the cash and Baltimore & Ohio stock disposed of in the extra dividend (so far as they exceeded the value of $4.12 per share of Union Pacific) did not constitute a gain, profit, or income of the Union Pacific, and therefore did not constitute a gain, profit, or income of the plaintiff arising or accruing either in or for the year 1914 or for any period subsequent to March 1, 1913, the date when the Income Tax Law took effect."

Then, after distinguishing the case at some length from *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, decided the same day, the Court held that it was ruled by *Hornby* v. *Lynch,* and that Pea-

body was taxable on all the dividend, including the part distributed from earnings prior to March 1, 1913.

In *U. S.* v. *Phellis* and *Rockefeller* v. *U. S., supra,* it is plain that the dividends there involved were paid in 1915 out of accumulated profits or surplus at March 1, 1913, in large part, if not wholly. No question of their non-taxability on this ground is raised or considered, but they were held to be taxable income to the stockholders on authority of *Peabody* v. *Eisner* and in harmony with *Hornby* v. *Lynch.*

As to the $5,796.53 of dividends distributed in cash in 1913 out of earned surplus at March 1, 1913, there is and can be no question that such sum was current income to the petitioner in 1913 and was taxable in that year. If the real estate transaction is, as he contends, a dividend of its value to the old corporation's stockholders, then such dividend is a current one taxable as income in that year. The petitioner made return of his income for taxation for the year 1913 (R. 18) and presumably included both the cash and real estate dividends in his income on such return.

Of course, if the dividends in question were current dividends constituting taxable income in 1913, then they could not be treated as a partial realization of the March 1, 1913, value of the stock and be combined with the value

realized at liquidation in 1920 into a so-called total value realized, and thereby be made to show a realization in excess of March 1, 1913, value, so that such excess might be set up as a gain subject to tax. This in effect would be to make the 1913 dividends income in 1920. The same income cannot be taxed in more than one year. And income taxable in a certain year, whether actually taxed then or not, cannot be transferred to and taxed as income in another year. In Article 22, Regulations 45, it is said:

> "Net income must be computed with respect to a fixed period. Usually that period is twelve months and is known as the taxable year."

And again in Article 23:

> "All items of gross income shall be included in gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be accounted for as of a different period. * * * A taxpayer is deemed to have received items of gross income which have been credited or set apart for him without restriction."

And again in Article 31:

> "Dividends are taxed at the rates for the year in which paid."

If the distribution in question in 1913 was taxable income in that year, then it cannot again be taxed in 1920. After income is once legally taxed, it becomes cap-

ital and is not again subject to tax. The truth of this is so obvious that no citation of authority is required. Yet the result of the Commissioner's action is to transfer taxable income in 1913 to 1920 and tax it in that year. The computation by which the Commissioner arrived at the alleged taxable gain realized by the plaintiff in error on each share of stock in the year 1920 may be set forth in the form of a table as follows:

Liquidating dividend July 20, 1920,		$319.46
March 1, 1913, Value (Cost)	$357.86	
Less cash and real estate distributed in 1913 out of March 1 value	153.15	
Cost remaining July 20. 1920		203.71
Gain taxable in 1920		$115.75

By a different arrangement of the table the same result is reached as follows:

Cash and real estate distributed in 1913 out of March 1 value	$153.15	
Plus liquidating dividend July 20, 1920	319.46	
Total realization on stock		$472.61
Less March 1, 1913, value (cost)		356.86
Gain taxable in 1920		$115.75

The total gain was arrived at by the Commissioner by multiplying $115.75, the gain per share above shown, by 150, the number of shares owned by the petitioner.

Omitting the 1913 dividends the computation would be as follows:

March 1, 1913, value per share	$356.86
Liquidating dividend July 20, 1920, per share	319.46
Net loss per share	$ 37.40

It thus appears that unless the 1913 dividends be held to be liquidating dividends, and not income and not taxable in that year, the plaintiff in error realized no gain on his stock in 1920, but instead realized substantially less than its March 1, 1913, value.

It must be borne in mind at all times that the Osage Mercantile Company had a large earned surplus on March 1, 1913, the exact amount thereof being $256.86 per share of stock; that after deducting the real estate and cash distributed out of such surplus in 1913, not only was its capital still unimpaired, but it had $103.71 per share of such surplus remaining; that it continued in business and carried on operations after the 1913 dividends the same as before down to its liquidation in 1920; that the plaintiff in error still owns the stock he received in 1913 in the Mercantile Real Estate Company, not having disposed of any of it; and that this corporation is still in existence and still owns all or substantially all of the real estate in question.

In our opinion the authorities presented above, in

the light of the uncontroverted facts, are conclusive in favor of the contention of the petitioner, and the judgment of the trial court must be reversed and the petitioner must be awarded judgment for the $6,642.13 in controversy with interest thereon at the rate of 6% per annum from October 30, 1923.

SECOND SPECIFICATION OF ERROR

This specification of error presents practically the same question as the first specification of error and depends on the determination of that one. If the real estate distributed and cash dividends paid out of surplus earned by the Osage Mercantile Company prior to March 1, 1913, were current dividends under the law and taxable as income to the stockholders in the year 1913 in which received, then their amount could not be applied in reduction of the March 1, 1913, value, or cost, of the petitioner's stock, and so to apply it and then use the reduced March 1, 1913, value of the stock as cost and deduct that value from the value of the corporation's assets at liquidation in 1920 to show a gain realized by the petitioner on his stock was erroneous and the petitioner should have recovered judgment. If he should have recovered judgment on this ground the amount thereof is not in dispute or controversy. Upon the trial it was

stipulated in the record by counsel for the respondent that if the Government's theory and method of treating the cash dividends paid and real estate distributed out of the surplus of the corporation at March 1, 1913, as liquidating dividends was not correct, then the plaintiff was entitled to judgment and that the amount of his judgment should be $6,642.13 (R. 64). Under this stipulation no computations based on March 1, 1913, value, or cost, and July 20, 1920, liquidation value, or sale price, of the petitioner's stock, as these values or figures are shown in the record, are necessary. The stipulation referred to is that if the Government is wrong and the petitioner right upon the question of the correct March 1, 1913, value of the stock to be used as cost in determining the gain in 1920, then the petitioner should have judgment for $6,642.13. But if the Government is right and the petitioner wrong on such theory and method, then the petitioner was entitled to receive only $216.26 of refund admitted by the Commissioner's letter. Hence, assuming that the petitioner's method and theory was correct, which, we believe, has been fully demonstrated under the first specification of error above, then it was error for the trial court to refuse to render judgment for the petitioner for $6,642.13, with interest at the rate of 6% per annum from October 30, 1923, and the costs of this action, and the judgment of that court should be re-

versed and the cause remanded with directions to enter such a judgment for the petitioner.

THIRD SPECIFICATION OF ERROR

The third specification of error relates to the question of the good will value of the stock at March 1, 1913. Good will, as an element of value in a commercial business, is fully recognized by business men and the courts, and also in the application of the Federal income tax laws by the Commissioner of Internal Revenue. In Article 41 of Regulations 45, promulgated by the Commissioner under the provisions of the Revenue Act of 1918, it is provided as follows:

> "Any profit or loss resulting from an investment in good will can be taken only when the business, or a part of it, to which the good will attaches is sold, in which case the profit or loss will be determined upon the basis of the cost of the assets, including good will, or their market value as of March 1, 1913, if acquired prior thereto. If nothing was paid for good will acquired after February 28, 1913, no deductible loss is possible, although, on the other hand, upon the sale of the business there may be a profit. It is immaterial that good will may never have been carried on the books as an asset, but the burden of proof is on the taxpayer to establish the cost or fair market value on March 1, 1913, of the good will sold."

It will be noted that the statement is twice made in this regulation that good will can be realized on only by

a *sale* of the business to which it attaches. This recognizes and emphasizes the fact that good will is inseparable from a business, and is indivisible and incapable of distribution in kind or of being realized upon in parcels. It is non-existent apart from a going business. This clearly appears from the nature of good will itself.

In 1 Bouv. Law Dict. 888, good will is defined as:

> "The benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices."

And in Lindley on Partnership, Wentworth's Ed. 440, quoted in Bouvier, good will is further defined as follows:

> "The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with

a particular house, and it may be so inseparably connected with it as to pass with it, under a will or deed, without being specially mentioned."

It will be noted that under this definition also it is only on the *sale* of a business that its good will has a marketable value.

It has been held that the value of the good will of a business corporation may be taken into account in determining the value of its capital stock for purposes of the capital stock tax imposed on corporations by Congress by the Act of September 8, 1916.

In *Central Union Trust Co.* v. *Edwards,* 282 Fed. 1008, it is held by the District Court of the Southern District of New York in an opinion by Judge Grubb, as stated in the syllabus, that:

"The tax imposed on corporations by Act. Sept. 8, 1916 (Comp. St. 5980a), is not a property tax, but an excise imposed on the privilege of doing business in corporate form as a going concern, and in measuring the value of its capital stock for purposes of the tax the good will of the corporation, its favorable contracts, amount of business done, and its profitable character are elements to be taken into consideration, as well as the value of its tangible property, less its debts."

On writ of error in the above case to the Circuit Court of Appeals, the judgment of the District Court was affirmed. *Central Union Trust Co.* v. *Edwards,* 287 Fed. 324.

The court in the opinion defines the phrase "the fair value of its capital stock" as used in the act to include good will.

The question under consideration is stated by the Court as follows:

> "Thus the formal question at bar is, What did Congress mean by 'the fair value of its capital stock,' as applied to a company of which its shareholders think so highly that they regard each share as worth nearly twice what they would get for it on liquidation in accordance with honestly and intelligently kept books?"

Further in discussiong the authorities, the Court says:

> "In Ohio, also, the Supreme Court found without objection that the state scheme regarded 'capital stock' as representing, 'not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern.' *Adams. etc. Co.* Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965."

The Court concludes and holds that good will of a business corporation is properly taken into account in determining the value of its capital stock for purposes of imposing the capital stock tax.

The evidence in the instant case without dispute shows that stock in the Osage Mercantile Company had a good will value of at least $100.00 per share at March 1, 1913, in addition to its tangible asset or book value as

determined by the Commissioner. The test of the March 1, 1913, value of any property as prescribed by the Revenue Act of 1918 is its fair market price or value on that date, and hence under the evidence in the instant case the fair market price of the stock on March 1, 1913, was $356.86 book value, plus $100.00 good will value, or $456.86. It is conceded that the stock had the same good will value at the time of the liquidation in 1920, but it is contended that the good will of a business corporation, being an intangible asset, is not susceptible of division and distribution among its stockholders on liquidation where its business and assets are not sold, but are distributed *in specie* or in kind to its stockholders. If the Osage Mercantile Company had sold its business and tangible assets, along with the lots and building where its business was conducted, in bulk and as a unit, then its good will asset would have passed in the sale to the purchaser. But this it did not do. Instead it liquidated by disbursing its assets in kind to its stockholders. By this method of liquidation each stockholder received out of the corporation's specific personal property, consisting of merchandise, furniture and fixtures, notes and accounts, etc., the proportion or share thereof to which his stockholdings entitled him. The location or place of the business, the lots and building, was not owned by the corporation, but was occupied by it as lessee, and hence it

could not distribute its good will incident to its place of business to the stockholders in liquidation.

It is contended that good will is necessarily attached to a business as a whole and cannot be subdivided and split up so that each of two or more persons may receive a moiety thereof. It is further contended that, unless in the distribution of the corporation's assets at liquidation a stockholder receives money or property that is distinct and separate from the interests of all other persons, so that he may handle it as he chooses and have it subject only to his exclusive control and use, he does not receive taxable income. Obviously good will cannot be thus subdivided and distributed among individuals, but must exist as a whole and pertain to a business existing and continuing as a unit.

Income is defined as the "gain derived from capital, from labor, or from both combined." *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415, 34 Sup. Ct. 136, 140, 58 L. Ed. 285; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185, 38 Sup. Ct. 467, 469, 62 L. Ed. 1054; *Eisner* v. *McComber,* 252 U. S. 189, 207, 40 Sup. Ct. 189, 193, 64 L. Ed. 521, 9 A. L. R. 1570. But not all gain so derived, though constituting income in a sense, is taxable income. Before income can be taxable to an individual it must be segregated and set apart to him, removed from the con-

trol of other persons and placed entirely under his individual control. This is well illustrated by the case of the accumulation of undistributed profits by a corporation. All gain derived by a corporation is gain derived by its stockholders, because the assets of a corporation belong to them by virtue of their stock, yet the gain derived by a stockholder from the fact that the corporation is earning large profits is not taxable income to him. This is well expressed in *Eisner* v. *Macomber, supra,* 209, as follows:

> "If profits have been made and not divided they create additional bookkeeping liabilities under the head of 'profit and loss,' 'undivided profits,' 'surplus account' or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only, (excluding, of course, a possible advantageous sale of his stock or winding up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested."

In administering the various revenue acts the Commissioner of Internal Revenue has consistently ruled

that if a taxpayer's right to receive property was conditional or incomplete and such property did not come into his possession with full power of disposal, it was not taxable income. On this point the following from Article 53, Regulations 45, is submitted:

> "Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. Where a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until the termination of five years of employment, the mere crediting on the books of the corporation does not constitute receipt. The distinction between receipt and accrual must be kept in mind. Income may accrue to the taxpayer and yet not be subject to his demand or capable of being drawn on or against by him."

In the instant case the assets of the Osage Mercantile Company were distributed one-half to the petitioner and one-half to his brother, R. W. Tucker. The distribution was in property consisting of merchandise, furniture and fixtures, accounts, etc. Each one took a half interest in this property. The good will was not subject

to division in two parts or to assignments of one-half thereof to each of them. Upon liquidation of the corporation they formed a partnership and each contributed to its capital his undivided half interest in the property received from the corporation. If it be argued that the partnership, when formed succeeded to the good will of the corporation, still the petitioner never realized anything on the good will value of his stock, for, as we have seen, the good will could not be subdivided and one-half thereof assigned to him subject to sale or other disposal by him. This in the nature of things was impossible. Good will cannot be divided and sold or disposed of in parcels. If the good will passed as a whole to the partnership, then the petitioner had nothing more than an undivided half interest therein which he could not separate or withdraw from the business and could not sell or dispose of at his pleasure. He might force a dissolution or liquidation of the partnership, but in such event the good will value would be lost. The only possible way for him to obtain anything for it would be for the partnership business to be sold as a whole, including good will. This he alone could not bring about, because it would require the concurrence of his partner in such sale. Neither could he sell out his interest in the partnership to a third person, who might come into it and take his place, and so realize on the good will value. Such an

arrangement would mean the dissolution of the existing partnership and the formation of a new one. This could be done only with the consent of the other partner. And if either of these things were done, then only and for the first time would he realize something of value separately and exclusively his and subject to his control and disposal. In fact the record shows the petitioner never realized on the alleged good will by either of the methods mentioned (R. 21-22). Consequently in no view of the matter can it be said that he received or realized in his possession and under his control and as his separate and exclusive property anything of value out of the good will of the corporation at the time of liquidation. The most he could be said to have received would be a right to half the benefits of the joint use of it without power to dispose of it.

In *U. S.* v. *Phellis, supra,* the stock there under consideration was said to be income because it was "received or drawn by the claimant for his separate use, benefit, and disposal," and again because it was drawn by the stockholders "severally for their individual and separate use and benefit." It is also said that the stock "was capable of distribution as the manufacturing assets whose place it took were not."

In the instant case the good will under consideration

was not something drawn by the petitioner for his separate use, benefit and disposal. Like the manufacturing assets above referred to, it was not capable of distribution. All he had was a joint interest with another in an intangible and evanescent property right, absolutely incapable of partition, which, upon the contingency of a sale, concurred in by his co-owner, in conjunction with the tangible property to which it was attached, part of which, the place of the business, neither of them owned or controlled, might be converted into money or tangible property capable of being drawn to his separate use, benefit and disposal. Only in that event if it had come to pass, could he be said to have realized anything on the good will value of his stock at liquidation of the corporation.

And in *Rockefeller* v. *U. S., supra*, it is said that the stock under consideration "was capable of division among stockholders as the pipe line properties were not," and that it constituted "actual exchangeable assets transferred to him * * * for his separate use." Like the pipe line properties the good will under consideration was not capable of division among the stockholders. Neither after liquidation did it constitute an actual exchangeable asset transferred to the petitioner for his separate use.

If the first specification of error is sustained, this one is immaterial to a decision of the case. If the first be not sustained and this one be sustained, then the judgment of the District Court should be reversed and the cause remanded with directions to that Court to redetermine the plaintiff in error's tax liability on the basis of $203.71 tangible assets value and $100.00 good will value, or $303.71 full value, per share at March 1, 1913, to be deducted from the amount realized at liquidation of the company in 1920 of $319.46 per share, leaving a net taxable gain per share of $15.75.

FOURTH SPECIFICATION OF ERROR.

This specification of error relates to the action of the trial court in refusing to enter judgment for the amount of tax admitted to be refundable, in the sum of $216.26 and interest, and for the costs of the action. It must be borne in mind that the petitioner paid the additional tax in the sum of $8,610.84, in which was included the $216.26 in question, under protest, and after notice and demand by the Collector, and under threat of penalty, if not paid within ten days after such notice (R. 49). The date of payment was October 30, 1923 (R. 50). Three days later, November 2, 1923 (R. 51-52), he filed with the Commissioner his claim

for refund of the tax in question. After the Commissioner had held this claim without action thereon one way or the other for almost a year, the petitioner filed this suit, October 7, 1924 (R. 2). More than six months after the suit was filed and more than two months after the issues were joined therein, and while the case was awaiting assignment for trial, the Commissioner, on April 24, 1925, issued his letter (R. 54-55) admitting that an illegal and excessive tax in the sum of $216.26 had been collected and allowing a refund for that amount, but rejected the claim for the balance. This was a confession of the petitioner's cause of action to the extent of the sum named. It must be conceded that his action was rightfully brought, and that under it he was entitled to recover such part of the amount claimed, though less than all, as might be admitted or judicially determined to have been erroneously and illegally assessed and collected. We know of no rule of law by which defendant, after suit brought and issue joined by a denial of liability, can then come into court and, by admitting that he owes a part of the amount sued for and offering to pay the same, be thereby relieved of a judgment against him for costs. And not only that, but even have judgment against him in any sum denied merely upon his promise that he would at some convenient time pay the amount admitted to be due. It must be borne in mind

that the respondent's answer of general denial was filed on February 9, 1925, or two and one-half months before the date of the Commissioner's letter allowing the amount of refund in question, and that no tender of that amount was ever pleaded in the case or paid into court, but the cause went to trial upon the petition of the plaintiff claiming a recovery and a general denial of all liability on the part of the defendant. In fact this admitted liability never got into the case at all until the petitioner offered evidence of it on the trial, and then counsel for the defendant in error objected vigorously to it and to a judgment for the amount admitted to be due because that would "carry costs with it," and because "the Department ought not to be penalized for costs on this" (R. 53-54). If there is any authority which would uphold a judgment against the plaintiff for costs and against his recovery of any sum, notwithstanding a confessed liability to him, we do not know of it or where it can be found. None was presented in the trial court. Upon what theory the trial court acted is not disclosed and we do not know.

The jurisdiction of the court rests upon Section 24 (5) of the Judicial Code, for the case arises under a law providing for internal revenue, and the amount involved or the amount of the recovery is immaterial.

It is clear that Section 968, Revised Statutes, does not apply, for jurisdiction is in no manner dependent on the amount in controversy.

The Circuit Court of Appeals said that if the petitioner "had based his suit upon any ground contained in the claim," and if the $216.26 "had been all or a part of the sum claimed under such ground," then he would have been entitled to a judgment for such sum and costs, but that, since "no refund of the above sum could have been secured" under his petition and the suit had nothing to do with procuring the refund, he had no right to his costs (R. 87)." In this the Circuit Court of Appeals has misunderstood the facts. The refund of said sum resulted from the reduction of the value of the assets of the Osage Mercantile Company at liquidation in 1920 from $97,292.71, as first fixed by the Commissioner (R. 4), to $95,825.79, by reason of a larger outstanding tax liability of the corporation, which was paid by the stockholders after liquidation, than the Revenue Agent and the Commissioner had estimated and used in their calculations (R. 17-19, 57-58). This precise ground was alleged in the claim for refund and upon it the said refund was allowed (R. 54-55), and this precise ground for recovery is alleged in the petition in the suit (R. 4), although the petitioner there alleged a larger amount of such outstanding liabilities than the proof showed at

the trial. So if the Circuit Court of Appeals had correctly grasped the facts on this point, then under its expressed view of the law the judgment of the trial court should have been reversed and a judgment directed for the petitioner for $216.26 and costs.

Attention is called to Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, which provides that no suit or proceeding for the recovery of any internal revenue tax shall be maintained until a claim for refund has been filed with the Commissioner, and further provides that: "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time." This statute plainly implies that after a taxpayer's claim for refund has been rejected, or after it has been held by the Commissioner for six months without a decision thereon, then there is no restriction or inhibition of his right to bring suit, but he is at liberty to proceed at once to do so. In the instant case the petitioner waited practically a year for the Commissioner to render a decision on the claim for refund before filing suit and then the Commissioner waited six months after suit was filed before he did render a decision. We know of no law and of no principle of reason or fairness that could justify penalizing the petitioner for costs of the

suit, which he had a right to bring, simply because he did not wait until the Commissioner, in his own good time and at his own sweet pleasure, should render a decision on the claim for refund. He had waited a year. He had no way of knowing whether a decision would come in six months, or twelve months, or years afterwards. The event proved that it did not come for more than six months after suit was filed.

If the first specification of error is sustained, then this one becomes immaterial, for judgment will have to be rendered for the plaintiff in error for an amount to be computed, which will be a little less than the $6,642.13 claimed, but will include this item of $216.26.

If neither the first nor the third specifications of error is sustained, then this one should be, and the case be remanded with directions to the trial court to enter judgment for the petitioner for $216.26 with interest at six per cent from October 30, 1923, and costs of the action.

CONCLUSION

In conclusion the petitioner says that the judgment of the Circuit Court of Appeals is reversible upon each of the five assignments of error which he has made in respect thereto and that it should be reversed on

each of the first four of said assignments. He says further that the judgment of the trial court is reversible upon each of the four specifications of error in respect thereto as above considered, and that it should be reversed upon the first and second of such specifications and the cause remanded with directions to enter judgment for the petitioner as plaintiff in the action for the sum of $6,642.13, with interest at 6% per annum from October 30, 1923, and the costs of the action.

Respectfully submitted,

CHARLES H. GARNETT,
Attorney for Petitioner.

INDEX

	Page
Opinions of the courts below	1
Jurisdiction	1
The question	2
Statement	2
Statute involved	7
Argument:	
This court has already decided the question involved in this case	8
Conclusion	11

AUTHORITIES CITED

Cases:	
Girard Trust Co. v. *United States*, 270 U. S. 163	8, 9
Hicks v. *James*, 48 Fed. 542, affirmed 110 U. S. 272	8
Kings County Savings Institution v. *Blair*, 116 U. S. 200	8
Nichols v. *United States*, 7 Wall. 122	8, 9
Rock Island, etc., R. R. Co., v. *United States*, 254 U. S. 141	8
Walker v. *Gulf & I. Ry. Co. of Texas*, 269 Fed. 885	6, 11
Statutes, etc.:	
Judicial Code, section 240 (a), as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938)	2
Revised Statutes, section 3226, as amended by section 1014 of Revenue Act of 1924 (c. 234, 43 Stat. 253, 343)	7
Treasury regulations 45 (1920 Ed.), article 1036	8

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 850

W. C. TUCKER, PETITIONER,

v.

ACEL C. ALEXANDER, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. Its judgment and findings will be found at page 73 of the record. The opinion of the Circuit Court of Appeals (R. 86) is reported in 15 F. (2d) 356.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 1, 1926. (R. 90.) A petition for rehearing was

denied January 15, 1927. (R. 96.) The petition for writ of certiorari was filed January 24, 1927. Jurisdiction to issue the writ applied for is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938).

THE QUESTION

In this case the question is, whether a taxpayer who has paid income taxes assessed against him for a certain year, and has filed a claim for refund of the taxes alleging two certain claims of error and stating that in all other particulars the Commissioner is correct, may when suing to recover the taxes paid, recover on a different ground of error from those set forth in his claim for refund.

STATEMENT

The petitioner was duly assessed additional income taxes for the year 1920 in the sum of $8,610.84, which taxes were duly paid under protest. (R. 3–4.) Thereafter, petitioner filed with the Commissioner of Internal Revenue his claim for refund of the said taxes on the form provided in accordance with the regulations, and stated the following reason why the refund should be allowed (R. 9):

> That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said Company as

> fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT: PA: FR–JRC–708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim.

In the above-mentioned appeal to the Commissioner the taxpayer stated as his ground of appeal (R. 57):

> The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.

After six months had expired without any decision by the Commissioner on the claim for refund, taxpayer brought this action in the District Court for the Western District of Oklahoma to recover said taxes claimed to have been illegally assessed

and collected. The grounds for recovery differed from those alleged in the claim for refund, and, as set up in the petition, are (R. 4):

> That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000 divided into 150 shares of the par value of $100 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000 divided into 300 shares of the par value of $100 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount

> on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took $356.86 per share, instead of the correct sum of $500 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders * * *.

After trial in the District Court, judgment was entered against the petitioner. (R. 73.) Petitioner then took the case to the Circuit Court of Appeals on writ of error, setting up eleven assignments of error (R. 78), those material here being as follows (R. 79):

> 3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.
>
> 4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders

with the distribution in kind of its tangible assets to them.

5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

The Circuit Court of Appeals affirmed the judgment of the District Court (R. 90), holding that the petitioner could not maintain an action to recover the taxes on a ground not alleged in the claim for refund but on an entirely distinct and separate ground which was not called to the Commissioner's attention in the claim for refund. (R. 86 et seq.)

Petitioner asks that this case be reviewed by this Court on the ground that the decision of the said Circuit Court of Appeals is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, and on the ground that the decision of the Circuit Court of Appeals below presents "three important questions of federal law which have not been, but should be, settled by this court." (Pet. 19, 22.)

STATUTE INVOLVED

Section 3226 of the Revised Statutes, as amended by Section 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343), provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

> (b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Article 1036 of Treasury Regulations 45 (1920 Ed.) provides:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 46 (revised). In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

ARGUMENT

THIS COURT HAS ALREADY DECIDED THE QUESTION INVOLVED IN THIS CASE

Petitioner's contention that he is entitled to set up certain grounds for relief in his claim for refund and then bring an action in court based upon distinctly different grounds, assailing action of the Commissioner of Internal Revenue which he had accepted as correct in his prior claim before the Commissioner is contrary to the principles stated in the decisions of this Court in *Nichols* v. *United States,* 7 Wall. 122, and *Girard Trust Co.* v. *United States,* 270 U. S. 163. Compare also *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Rock Island, etc., R. R. Co.* v. *United States,* 254 U. S. 141; and *Hicks* v. *James,* 48 Fed. 542, affirmed 110 U. S. 272.

As early as 1868 this Court, in *Nichols* v. *United States, supra,* held that under the laws of Congress then in force relating to the recovery of duties paid under protest, a written protest signed by the party, with a statement of the different grounds of objection to the duties demanded and paid, was a necessary condition precedent to suit for refund. This Court said (p. 131):

> The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

As late as 1926, in *Girard Trust Company* v. *United States,* 270 U. S. 163, this Court approved the above ruling in the following language (p. 172):

> The Government's contention is that the distinction made in Section 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the

> date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once.

These cases dealt with protests, not claims for refund, but the principle is applicable to both.

The statute provides that no action shall be maintained to recover taxes illegally assessed until a claim for refund has been filed according to regulations established by the Secretary of the Treasury.

The regulations of the Secretary of the Treasury and the forms provided therein require the taxpayer to state the reasons on which his claim for refund is based. The necessary effect is to deny relief in the courts on grounds not stated in the claim for refund. To hold otherwise would nullify the statute and regulation in so far as they require the grounds of the claim to be stated to the Commissioner. In the instant case, after setting forth his reasons, petitioner expressly states (R. 57) that "in all other respects the taxpayer accepts

the Revenue Agent's report," so that not only did he fail to allege in his claim for refund the grounds on which in this action he claims the taxes were illegal, but he had previously stated to the Commissioner that no other grounds existed and that he approved the action of the Commissioner in all other particulars.

The case of *Walker* v. *Gulf & I. Ry. Co.*, 269 Fed. 885, relied upon by petitioner is not in conflict with the court's ruling in the instant case. That case is simply authority for the rule that ordinarily an appellate court will not consider errors which were not raised in the trial court.

CONCLUSION

The question involved in this case was correctly determined in accordance with the plain provisions of the statute and with the decisions of this Court. It is respectfully submitted that the prayer of petitioner should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Attorney.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

FRED W. DEWART,
Special Attorney, Bureau of Internal Revenue.

FEBRUARY, 1927.

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INDEX

	Page
Opinions of courts below	1
Jurisdiction	1
The questions presented	2
Statutes involved	2
Statement	4
Summary of argument	11
Argument:	
I. Matters dealt with below by the District Court relating to the merits of the case and the correct amount of the tax are not properly before this Court for decision	13
II. In a suit to recover taxes alleged to have been illegally assessed no recovery should ordinarily be allowed on any ground which has not been asserted in the claim for refund filed with the Commissioner of Internal Revenue	15
III. Was the defect in the claim for refund waived in the District Court	19
Conclusion	26

CITATIONS

Cases:	
Arnson v. *Murphy*, 109 U. S. 238	17, 18, 23
Cheatham v. *United States*, 92 U. S. 85	17, 21
Collector v. *Hubbard*, 12 Wall. 1	24
Finn v. *United States*, 123 U. S. 227	20, 22
Girard Trust Co. v. *United States*, 270 U. S. 163	17
Hicks v. *James*, 48 Fed. 542; 110 U. S. 272	17
Kings County Savings Institution v. *Blair*, 116 U. S. 200	17, 22
Louisville Cement Co. v. *Interstate Commerce Commission*, 246 U. S. 638	22
Maryland Casualty Co. v. *United States*, 251 U. S. 342	15, 17
Nichols v. *United States*, 7 Wall. 122	16
Phillips v. *Grand Trunk Ry.*, 236 U. S. 662	22
Rock Is., Ark. & La. R. R. Co. v. *United States*, 254 U. S. 141	17, 22
Statutes, etc.:	
Revised Statutes, Sec. 3226, as amended by Sec. 1014, Revenue Act of 1924, c. 234, 43 Stat. 253, 343; U. S. C., Title 26, Sec. 156	2, 3
Treasury Regulations No. 45 (1920 ed.), Art. 1036	4
Encyc. Pleading & Practice, vol. 4, p. 293	14

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 167

W. C. TUCKER, PETITIONER

v.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. Its judgment and findings will be found at page 74 of the record. The opinion of the Circuit Court of Appeals (R. 83) is reported in 15 F. (2d) 356.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 1, 1926. (R. 87.) A petition for rehearing was denied January 15, 1927. (R. 89.) A petition for certiorari was filed January 24, 1927, and was

66824—27——1

allowed March 7, 1927. (R. 90.) Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The ultimate question is whether, in a suit by a taxpayer against a collector of internal revenue to recover a tax claimed to have been illegally assessed, the collector and his counsel may waive compliance with the statutory requirement that no suit shall be maintained in any court for the recovery of any internal-revenue tax until a claim for refund, stating the ground of the claim, has been presented to the Commissioner of Internal Revenue.

The question also arises whether Section 3226 of the Revised Statutes and the regulations adopted thereunder should be construed to prevent a recovery in such action on any ground not set forth in the claim for refund previously filed with the Commissioner of Internal Revenue.

Another question is whether on certiorari this Court will, ordinarily, consider any question not raised in the petition for certiorari or supporting brief and not considered by the Circuit Court of Appeals.

STATUTES INVOLVED

At the time this suit was filed Section 3226, R. S., as amended by Section 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343; U. S. C., Title 26, Sec. 156), read as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

At the time the claim for refund was filed (November 2, 1923) Section 3226 was as above set forth except for the words "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest

or duress," which were added by the amendment of 1924.

Article 1036 of Treasury Regulations No. 45 (1920 edition) provides:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 46 (revised). In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim shall be clearly set forth under oath.

Subsequently Form 843 took the place of Form 46. That form (R. 6), which was part of the regulation, required the claimant to state the grounds for his claim.

STATEMENT

This was a suit by the petitioner against a collector of internal revenue to recover an income tax for the year 1920 in the sum of $8,610.84, claimed to have been illegally assessed. A jury was waived and the case was tried to court, which made special findings of fact and ordered judgment for the defendant. The District Court decided the case on the merits, holding that no excessive tax had been collected. No point was made by the collector in the District Court respecting the sufficiency of the claim for refund which had been filed with the collector, nor was the claim there asserted that recovery could not be had on a ground not set up in the claim for refund. This point was raised for

the first time by the Collector in the Circuit Court of Appeals, which sustained it and did not pass on the merits.

The special findings of the District Court (R. 74–79) show that petitioner in 1920 was the owner of 150 shares (half) of the outstanding capital stock of the Osage Mercantile Company, a corporation, and that the company was liquidated in that year by distribution of its assets, and the question was as to the gain derived by the petitioner from such liquidation. He had owned the stock at and prior to March 1, 1913. The assets of the corporation were not sold at liquidation but were distributed in kind to the petitioner and his brother, who owned all the stock and who assumed all of the corporation's liabilities, and formed a partnership to take the assets and go on with the business. Between March 1, 1913, and the date of liquidation in 1920 the corporation had made a distribution of real estate and money, and the question was whether these distributions should be treated as a return of capital deductible from the cost or March 1, 1913, value in computing the gain derived from liquidation in 1920. One of these distributions occurred May 13, 1913, when the corporation conveyed certain real estate to the Mercantile Real Estate Company, a corporation organized for that purpose and the stock of which was taken by the stockholders of the Osage Mercantile Company pro rata. The other distribution was a dividend in money,

May 14, 1913, out of profits acquired prior to March 1, 1913.

Before the trial closed it appeared and was conceded by both sides (R. 64, petitioner's brief, p. 19) and found by the court that the March 1, 1913, value of the stock was $356.88 per share. The value of the assets of the corporation at date of liquidation in 1920 was likewise found and conceded to be $319.42 per share. The value of the distributions made between March 1, 1913, and date of liquidation was also found and conceded to be $153.15 per share. This left only in dispute the question whether the distributions referred to should be treated as returns of capital, and therefore as a return of part of the cost or March 1, 1913, value, so that in determining the gain realized from the liquidation in 1920 there should be deducted from the March 1, 1913, value the amount of the distributions and only the balance should be deducted from the amount realized in 1913 in determining the profit from the liquidation.

This statement is subject to the qualification that the value as of March 1, 1913, was arrived at without including good will, and the petitioner did complain of that, but since good will was also excluded in fixing the value of the assets at liquidation, and whatever good will existed was distributed in 1920, the point is of no real substance. Again, there was a dispute as to the value of the real estate, but since the same value was placed on it March 1, 1913,

and at the date of its distribution, May 14, 1913, and it was not claimed that any change in value occurred between those dates, that dispute seems of no consequence. In any event, we are safe in stating that on the special findings of the trial court no recovery could be had by the petitioner unless on the ground that as a matter of law the distributions of real estate and dividends should not have been treated as returns of cost or March 1, 1913, capital value.

In his petition in the District Court petitioner alleged (R. 4) that he had previously filed with the Commissioner of Internal Revenue a claim for refund "in due form of law and upon the form prescribed therefor by said Commissioner." Copy of the claim for refund (marked "Exhibit C") was made a part of the petition. (R. 6.)

The collector interposed a general denial. (R. 6.) The claim for refund was offered in evidence by the petitioner. (R. 51.) It stated generally, as to ground for the claim, that the taxpayer actually had a loss instead of a profit on the liquidation—

> as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT: PA: FR–JRC–708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim.

66824—27——2

The document referred to in the claim, and made part of it by reference (R. 54), gave as a ground of the claim for refund the following reasons:

> The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier whch the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.

It will be observed that in the claim for refund it was asserted that error had been made in determining the March 1, 1913, value of the stock and that error had been made in determining the net value of the assets distributed in kind at liquidation in 1920, but nothing was said respecting the matter of deduction, from March 1st, 1913, value of the stock, of the distributions which had taken place between March 1, 1913, and the date of the liquidation, and, on the contrary, the claim for refund expressly accepted the decision of the Bureau of Internal Revenue in all but the two respects stated. (R. 54–55.)

In his petition in the District Court (R. 4) it was alleged as a ground for recovery, first, that the Commissioner took $356.86 per share as the fair value on March 1, 1913, when the true value was $500, and, second, that the Commissioner made a mistake in determining the net value of the assets at dissolution. These grounds for recovery stated in the petition were the same as, or were broad enough to include, the grounds for recovery set up in the claim for refund, but both of them were abandoned during the trial and an entirely different ground assigned for recovery. The attack on the valuation placed on the stock as of March 1, 1913, was abandoned (R. 64; brief for petitioner, p. 19), as was the claim of error in determining the value of the assets distributed in kind at the liquidation in 1920 (R. 64); and as the case was finally submitted to the trial court the only question was whether the distributions made between March 1, 1913, and the date of liquidation were income to the taxpayer, or whether they were returns of the cost or capital value of the stock as of March 1, 1913, and which should be charged to him as such in determining the gain derived from the liquidation. This ground for recovery was not set up in the claim for refund filed with the Commissioner, nor in the petition in the United States District Court. It was, however, litigated by consent. In the opening statements of counsel for the collector and for the taxpayer (R. 7–11), which clearly state the questions to be tried, there is no suggestion that any point was involved

as to the sufficiency of the claim for refund or that no recovery could be had on the ground that the distributions had been improperly treated as return of capital value because that ground was not set up in the claim for refund. The record in the District Court does not show that this question was mentioned.

Towards the close of the trial (R. 64) a stipulation was made in open court stating what the question was for decision, and which was, in effect, a stipulation that if the collector was wrong in the deduction of the distributions from the March 1, 1913, value, the taxpayer was entitled to a judgment for a specified amount, $6,642.13.

In its findings the trial court made no reference to the form of the claim for refund, finding, generally, that a claim for refund was filed.

The Circuit Court of Appeals, on writ of error sued out by the petitioner, did not pass on the merits of the case or the correctness of the computation of the tax, but held that the taxpayer could not recover because the claim for refund did not state the grounds for recovery set up in the petition in the District Court. Whether this point had been waived by the collector in the court below, or whether he had power to waive it, was not considered by the Circuit Court of Appeals.

Instead of remanding with instructions to dismiss without prejudice to a new claim for refund and another suit, it affirmed the judgment on the merits.

The petition for certiorari filed in this Court specified as the grounds for issuing the writ and as the errors complained of in the action in the Circuit Court of Appeals (Petition for certiorari, pp. 19–27) that the Circuit Court of Appeals had erred in holding that the grounds for recovery relied on in the suit had not been specified in the claim for refund, in holding that the statute and regulations should be construed to require the grounds to be set forth, and in holding that the failure to set forth in the claim for refund the grounds for refund relied on in the suit was a defect which the Circuit Court of Appeals could take notice of, although not raised in the District Court. The same grounds for issuing the writ were presented in the supporting brief (pp. 29–49). The petition for certiorari and supporting brief did not deal with the merits.

SUMMARY OF ARGUMENT

I. On certiorari to a United States Circuit Court of Appeals this Court should ordinarily not consider any question not raised in the petition for certiorari or supporting brief and not considered by the Circuit Court of Appeals, and there is nothing in this case to justify the Court in exercising any discretion it may have to consider questions not raised in the petition for certiorari or supporting brief and not considered or decided by the Circuit Court of Appeals.

II. Under Section 3226 of the Revised Statutes and the regulations adopted thereunder no recovery

should be allowed in a suit to recover taxes claimed to have been illegally assessed, on any ground not stated in the claim for refund filed with the Commissioner of Internal Revenue. The statute provides that no such suit shall be maintained unless a claim is filed in accordance with the regulations established by the Secretary of the Treasury. The regulations prescribe that the claim shall specify the grounds or reasons on which it is based. The regulation has the force of law. Compliance with the statute and regulations is a condition precedent to recovery against either the United States or a collector of internal revenue. The purpose of the statute is to prevent litigation against the United States or a collector until the Commissioner of Internal Revenue has had opportunity to examine the alleged grounds for recovery. The burden is on the taxpayer to plead and prove the fact that the ground of recovery relied on in the statute was stated in the claim for refund.

III. In the present case it appears from the record that the ground for recovery finally relied on was not mentioned or suggested in the claim for refund. It appears also that this defect in the claim for refund was not relied on by the collector at the trial in the District Court, but he, by stipulation, in effect eliminated the question from the case by stipulating that the only question for decision related to the manner of computation. This amounted to a waiver of the point if it was competent for the collector and his counsel to waive

it. It has been held that statutes of limitation imposed as conditions to the consent of the United States to be sued are jurisdictional and can not be waived; and something may be said on the proposition that in a suit against the United States or the Collector of Internal Revenue the condition imposed by this statute may not be waived, but it is far from clear that, in respect of the form of a claim for refund which is prescribed by regulation of the Treasury Department, public policy denies authority to the collector to waive compliance with the regulation.

ARGUMENT

I

MATTERS DEALT WITH BELOW BY THE DISTRICT COURT RELATING TO THE MERITS OF THE CASE AND THE CORRECT AMOUNT OF THE TAX ARE NOT PROPERLY BEFORE THIS COURT FOR DECISION

The petitioner devotes a large part of his brief to consideration of the decision of the District Court and of the proper method of computing the tax in question. These matters are not properly before this Court for consideration. The specification of errors assigned in the petition for certiorari and supporting brief and the grounds for the issuing of the writ urged upon this Court in those documents are confined to the points dealt with by the Circuit Court of Appeals and to the questions whether the claim for refund was in the form prescribed by law and regulations, and

whether the Circuit Court of Appeals had a right to deal with that question which had not been raised in the trial court.

In dealing with writs of certiorari appellate courts have been strict in confining themselves to the points or alleged errors set forth in the petition for certiorari. Some courts have gone to the extent of holding that on certiorari the appellate court has no power to deal with any point not so specified. See Encyc. Pleading and Practice, Vol. 4, p. 293, and cases cited.

In the present case the petition for certiorari could not properly specify any errors relating to the merits of the case, because the Circuit Court of Appeals did not pass on the merits.

Ordinarily this Court will not consider questions not dealt with by the Circuit Court of Appeals. Conceding that this Court, in its discretion, may consider questions not dealt with by the Circuit Court of Appeals and not mentioned in the petition for certiorari and supporting brief, this is not a proper case for the exercise of such discretion. The questions relating to the merits of this case and the computation of this tax are of no general importance and would not justify the consideration of this Court in any event. If the Circuit Court of Appeals was not right in the ground for its decision, the merits of the case should not be considered here, but the case should be remanded to the Circuit Court of Appeals for decision.

II

IN A SUIT TO RECOVER TAXES ALLEGED TO HAVE BEEN ILLEGALLY ASSESSED NO RECOVERY SHOULD ORDINARILY BE ALLOWED ON ANY GROUND WHICH HAS NOT BEEN ASSERTED IN THE CLAIM FOR REFUND FILED WITH THE COMMISSIONER OF INTERNAL REVENUE

The statute prescribes that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously collected

> until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.

The statute requires that a claim for refund shall be filed, but does not specify its form or contents, and leaves it to the Secretary of the Treasury to fix them by regulation. The regulation prescribed that the claim for refund "shall be made on Form 46," and also that all facts relied on in support of the claim must be clearly set forth under oath. Form 46, and a later form, 843 (which was used in this case, R. 6), provide on their face for a statement of the grounds or reasons on which the claim for refund is based. The form is a part of the regulation. The regulation has the force of law. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. These provisions originated in Section 19 of the In-

ternal Revenue Act approved July 13, 1866 (C. 184, 14 Stat. 98, 152), about which this Court said in *Nichols* v. *United States,* 7 Wall. 122, 130:

> To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system,* which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.
>
> And an equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment, or collection of taxes, by suit: but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the Commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal. (14 Stat. at Large, 111, amendment to Sec. 44; Sec. 19, on p. 152.) Thus it will be seen that the

> person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to the Commissioner, and at all events, he is barred from bringing a suit, unless he does it within a year from the time the Commissioner is notified of his appeal. The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

See *Cheatham* v. *United States,* 92 U. S. 85; *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Rock Island, Ark. & La. R. R. Co.* v. *United States,* 254 U. S. 141; *Hicks* v. *James,* 48 Fed. 542, 110 U. S. 272; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Girard Trust Co.* v. *United States,* 270 U. S. 163. Some of these cases dealt with protests and not claims for refund, but the principle is applicable to both. The statute applies to suits against collectors as well as to suits against the United States. (See *Kings County Savings Inst.* v. *Blair, supra; Arnson* v. *Murphy,*

109 U. S. 238; *Sage* v. *United States,* 250 U. S. 33.) To hold that recovery may be had in court on grounds not stated but, as in this case, waived in the claim for refund, would be to nullify the statute and regulation and defeat their purpose.

In the present case the Circuit Court of Appeals was in error in saying that the grounds for recovery set up in the petition in the District Court differed from those set up in the claim for refund. The grounds alleged in the petition in the District Court were substantially the same as those set up in the claim for refund, relating, as they did, to the value of the stock as of March 1, 1913, and to the net value of the assets distributed in kind at the date of liquidation in 1920, but the taxpayer abandoned the grounds set up in his petition and in his claim for refund, and the only ground for recovery really relied on at the close of the trial was that the distributions made between March 1, 1913, and the date of liquidation were improperly deducted from the March 1, 1913, value in the computation of the gain. No such ground was asserted in his claim for refund or in his petition in the United States District Court. Although the Circuit Court of Appeals was mistaken in saying that the petition in the District Court did not assign any ground for recovery stated in the claim for refund, it was right in considering the question in the case, because the ground for recovery actually relied on in the District Court, although not

pleaded, was not suggested but had been waived in the claim for refund.

III

WAS THE DEFECT IN THE CLAIM FOR REFUND WAIVED IN THE DISTRICT COURT?

The record shows that the point that the ground relied on for recovery in the District Court had not been specified in the claim for refund was not raised or mentioned in the District Court. The plaintiff had the burden of establishing compliance with this condition precedent and accepted the burden in his petition and proof. His proof showed affirmatively that he had not raised in his claim for refund the point relied on in court, but no advantage was taken of that fact by any action in the District Court by the collector. It was not the duty of the collector to plead and prove noncompliance with the statute and regulation as a matter of defense. His answer denied that the claim for refund had been filed in due form of law. If he had merely remained silent in the District Court, since the record shows affirmatively that the condition precedent had not been complied with, and since the findings fail to show compliance with this condition precedent, the point might have been open to him in the Circuit Court of Appeals, but the record affirmatively shows that the question was removed from the case so far as the collector had power to remove it.

The opening statement of counsel in defining the questions for decision did not mention the point.

Near the close of the case, in order to simplify the issues, a stipulation or admission was made in open court by the collector. (R. 64.) As we construe this stipulation it was to the effect that the March 1, 1913, value of the stock was agreed to; that the net value of the assets liquidated was agreed to; that the value of the intermediate distribution was agreed to, and that the only question left for decision was whether the intermediate distributions should be deducted from the March 1, 1913, value, and the stipulation is to the effect that if the Government was wrong in making this deduction and in its method of computing the March 1, 1913, value, by deducting the intermediate distributions, the plaintiff was entitled to judgment for $6,642.13. It must be admitted that counsel for the collector did not intend to raise the point and intended to make a stipulation to the effect that only the question of computation was left for decision. Unless there is a rule of public policy which forbade the collector from making such a concession we do not see how the point was left in the case.

In dealing with conditions in the nature of statutes of limitation attached by Congress to its consent to suits against the United States, this Court has said that the conditions are jurisdictional and that no officer has authority to waive them.

In *Finn* v. *United States,* 123 U. S. 227, on the question of such a limitation in an action against the United States in the Court of Claims, it was said (p. 232):

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

In *Cheatham* v. *United States,* 92 U. S. 85, 88, 89, the Court said:

> It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues. * * * In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must

> be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax.

And in *Rock Island, Ark. & La. R. R. Co.* v. *United States,* 254 U. S. 141, it was said (p. 143):

> Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. * * * At all events the words are there in the statute and the regulations, and the court is of opinion that they mark the conditions of the claimant's right.

And various limitations made by the Interstate Commerce Act on the presentation of claims against carriers have been held to be jurisdictional. *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642.

While *Finn* v. *United States, supra,* and other similar cases deal with conditions attached by the sovereign to its consent to be sued, and the present case is not a suit against the United States, but one at common law against the collector, Congress has, for obvious reasons, regulated and modified by statute the common-law liability of collectors.

In *Kings County Savings Inst.* v. *Blair, supra,* the action was against the administrator of the estate of the deceased collector. This Court said (116 U. S. 205):

> We regard the presentation of the claims to the commissioner of internal revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States,* 92 U. S. 85; *Railroad Company* v. *United States,* 101 U. S. 543; *Arnson* v. *Murphy,* 109 U. S. 238.

In *Arnson* v. *Murphy,* 109 U. S. 238, where the action was against the collector of customs, the Court said (p. 243):

> From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout,* 10 Pet. 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive.

And again, in *Sage* v. *United States,* 250 U. S. 33, it was said (p. 36):

> It is true that the statutes modify the common law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit. Rev. St. Sec. 3226.

In *Collector* v. *Hubbard*, 12 Wall. 1, in dealing with a suit against the collector to recover taxes claimed to have been illegally assessed, in construing the Act of July 13, 1866, which enacted that no suit could be maintained in any court to recover a tax illegally assessed until the taxpayer had appealed to the Commissioner of Internal Revenue, this Court said (page 14):

> Suits for such causes of action are absolutely prohibited until the taxpayer shall appeal to the Commissioner of Internal Revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken.

In none of these cases, dealing with the statutory requirement that an appeal must be filed or a claim filed with the Commissioner of Internal Revenue before a suit to recover the tax is maintained, has this Court said or held, as it did in connection with statutes of limitation on suits against the United States, that noncompliance may not be waived.

In deference to the Circuit Court of Appeals and the views of the Bureau of Internal Revenue, the question is submitted for decision, but we are not prepared to insist that the rule which has been applied to limitations prescribed in connection with the sovereign's consent to be sued is applicable to a condition precedent such as that here involved. In the present case the defect in the claim for refund was in form and contents. They were prescribed not by statute but by regulation of the Treasury Department. If no officer has authority to waive the statutory requirement that a claim for refund shall be filed, it may be that public policy requires that the condition precedent as to contents of the claim prescribed by regulations of the Treasury Department is one which counsel for the United States or for a collector of internal revenue has not authority to waive, but this seems doubtful. In the present case, it may have been to the interest of the United States to waive it. To assert it might have resulted in the dismissal of the suit, to be followed by a new claim for refund and another suit. If the Commissioner of Internal Revenue had not been deceived or misled as to the ground for the claim for refund it might have been considered advisable to have the case disposed of on the merits without raising a technical question which would result in further legal proceedings without any gain to the collector or the Government.

CONCLUSION

Unfortunately, not until this case has reached this Court has it been sifted down to the ultimate question. It seems reasonably clear that the Circuit Court of Appeals was right in holding that ordinarily no recovery may be had in a suit to recover a tax illegally assessed unless the ground for recovery relied on in the suit is stated in the claim for refund. It is likely that the Circuit Court of Appeals may consider such a point where it appears from the face of the record that on the plaintiff's own case in a matter respecting which the burden rested on him he had failed to comply with the statutory condition precedent. The difficulty with this case rests in the fact that the point seems to have been stipulated out of it in the trial court, a situation which does not appear to have been brought to the attention of the learned judges of the Circuit Court of Appeals.

If this Court concludes that the point is one the collector of internal revenue had no authority to waive, the case should be remanded for dismissal without prejudice. Even if the Circuit Court of Appeals was right in holding that the condition precedent had not been complied with, and that the point was still in the case, instead of affirming the judgment on the merits, it should have remanded

for dismissal without prejudice to the filing of another claim for refund and a subsequent suit.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

F. W. DEWART,
Special Attorney,
Bureau of Internal Revenue.

OCTOBER, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 167.—October Term, 1927.

W. C. Tucker, Petitioner, *vs.* Acel C. Alexander, Collector of Internal Revenue, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals For the Eighth Circuit.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, from March 1, 1913, and in 1920, was the owner of shares of stock in a corporation which in the latter year was dissolved and liquidated. A distribution of some portion of its assets to the stockholders had been made in May, 1913. The Commissioner of Internal Revenue taxed as income on dissolution the difference between the value of the property received by petitioner as a liquidating dividend, and the value of his stock on March 1, 1913, less the value of the distribution of May, 1913, which was treated as a return of capital. Petitioner paid the tax under protest, setting up that it was excessive, and after filing a claim for refund brought the present suit in the district court for western Oklahoma to recover the excess. In his claim for refund petitioner assigned as reasons for it (1) the Commissioner's erroneous computation of the value of the stock on March 1, 1913, and (2) his failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders, but no explicit statement was made that the Commissioner had erred in decreasing the March 1, 1913, value by the value of the property distributed in May, 1913, nor was that point raised by the petition in the district court which in effect merely repeated the allegations of the claim for refund.

In the course of the trial petitioner without objection by the government abandoned the grounds of recovery stated in the petition and attacked only the Commissioner's deduction of the return

of capital from the March 1, 1913, value. That issue alone was litigated. At the close of the trial counsel stipulated that, if the court found the deduction to have been erroneously made, the petitioner should have judgment in a sum named. The district court's judgment for petitioner was reversed by the court of appeals for the eighth circuit [15 Fed. (2d) 356] which held that a recovery on grounds different from those set up in the claim for refund was precluded by § 3226 of the Revised Statutes as amended by § 1014 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343; U. S. C., Title 26, § 156). The case was brought here on certiorari to review this determination. 273 U. S. 689.

Section 3226 provides that "No suit or proceeding shall be maintained . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; . . ." And article 1036 of Treasury Regulations No. 45 (1920 ed.), in force when the claim for refund was filed, requires that such claims "shall be made on Form 46 (revised)," and that "all the facts relied upon in support of the claim shall be clearly set forth under oath." In the form referred to a space was provided for the claimant to set out the reasons why his application should be allowed.

In our view of the case the question considered by the circuit court of appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.

If the Collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.

Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair*, 116 U. S. 200; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 353, 354; *Nichols* v. *United States*, 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States*, 123 U. S. 227. Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist —consequences which do not attach to the waiver here.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.